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THE INDIAN EVIDENCE ACT, 1872

AND

THE INDIAN OATHS ACT, 1873,

WITH THE SPEECHES DELIVERED BY THE LAW MEMBER WITH REFERENCE TO THE INDIAN EVIDENCE BILL WHILE IT WAS BEFORE THE LEGISLATIVE COUNCIL AND NOTES CONTAINING ALL THE MOST RECENT DECISIONS OF ALL THE HIGH COURTS IN INDIA; THE SECTIONS OF THE NEW CRIMINAL PROCEDURE CODE RELATING TO THE EXAMINATION OF ACCUSED PERSONS, CONFESSIONS AND TENDER OF PARDON TO ACCUSED PERSONS, THE RE-CALLING AND CROSS-EXAMINATION OF THE WITNESSES FOR THE PROSECUTION BY ACCUSED PERSONS, AFTER CHARGE IS FRAMED, THE SUMMONING AND EXAMINATION OF WITNESSES FOR THE PROSECUTION AND DEFENCE; AND THE PROVISIONS OF THE NEW CIVIL PROCEDURE CODE RELATING TO THE FILING, PRODUCTION, DISCOVERY, AND INSPECTION OF DOCUMENTS.

BY

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The Speech of the Honorable Mr. Stephen delivered, on the 31st March 1871, on the occasion of presenting the report of the Select Committee on the Bill to define and amend the Law of Evidence (which will be found in Extra Supplement to Gazette of India of 18th April 1871 p. 42.)

"I feel that I owe an apology to your Lordship and the Council for requesting their attention to a second speech upon a purely legal subject after the one which I delivered a week ago upon the Limitation Act. On this occasion, however, I have to explain the position of a measure perhaps as important as any that has been passed of late years by the Indian legislature, inasmuch as, if it becomes law, it will affect the daily administration of both civil and criminal procedure throughout the whole country. Moreover, the subject-matter to which the Bill refers is one of deep and wide general interest, for a law of Evidence properly constructed would be nothing less than an application of the practical experience acquired in Courts of law to the problem of inquiring into the truth as to controverted questions of fact, however imperfectly it may have been attained.

"This is the object which has been kept in view in framing the Bill which the Committee append to their report, and which I am now to describe in a general way to your Lordship and the Council.

"I will state, in the first place, the history of the measure down to the present time. So far back as the year 1868, the Indian Law Commissioners drew a draft Evidence Act, which was sent out to this country, and introduced and referred to a Select Committee by my friend and predecessor Mr. Maine. The Bill was circulated for opinion to the Local Governments, and was pronounced by every legal authority to which it was submitted to be unsuitable to the wants of this country. In this view the Committee concur for reasons which I need not state in detail on the present occasion, as they are fully stated in the report which I present to-day. I may observe in general, however, that the principal reasons were that the Bill was not sufficiently elementary; that it was in several respects incomplete, and that, if it became law, it would not supersede the necessity under which judicial officers in the couutry are at present placed

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of acquainting themselves by means of English hand-books with the English law upon this subject. The Commissioners' draft, indeed, would hardly be intelligible to a person who did not enter upon the study of it with a considerable knowledge of the English law. Under these circumstances, a new draft was framed, which we now propose to print and circulate, and on which I hope to receive the opinions of the Local Governments and High Courts in the course of the summer, say, by next September, so that their criticisms may be deliberately weighed, and the measure may be finally disposed of by this time next year.

"The report of the Committee explains very fully the scheme of the Bill, which, of course, is of considerable, though not, I hope, unwieldy, length, and enters fully into the reasons which have led us to adopt its leading provisions. I will not weary the Council by going into all these questions on the present occasion. I will confine myself to saying that I trust that those who will have to criticise the Bill will begin by studying the report, which has been drawn up with great care, and which, as well as the Bill itself, forms a connected and systematic whole. The general object kept in view in framing the Bill has been to produce something from which a student might derive a clear, comprehensive and distinct knowledge of the subject, without unnecessary labour, but not, of course, without that degree of careful and sustained attention which is necessary in order to master any important and intricate matter. It is by this standard that the Committee in the general, and I in particular as the member in charge of the Bill, desire that it may be tried.

"With this reference to the Bill and the Report of the Committee, I proceed to discuss the general questions connected with the subject, and to mention a few of the leading features of the measure.

"I suppose that I may assume as generally admitted the necessity which exists for legislation on the subject of evidence in British India. It would be exceedingly difficult to say precisely what, at the present moment, the law upon the subject certainly is. To some extent—it is far from being clear to what extent—and in some parts of the country—though questions might be raised as to the particular parts of the country—the English Law of Evidence appears to be in force in British India. Whatever may be the theory, it both is and will continue to be so in practice; for if the English Law of Evidence has not been introduced into this country, English lawyers and quasi-lawyers have, and they have been directed to decide according to the law of justice, equity, and good conscience. Practically speaking these attractive words mean little more than an imperfect understanding

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of imperfect collections of not very recent editions of English text-books. It is difficult to imagine anything much less satisfactory than such a state of the law as this. A good deal may be said for an elaborate legal system, well understood and strictly administered. A good deal may be said for unaided mother-wit and natural shrewdness; but a half and half system, in which a vast body of half-understood law, totally destitute of arrangement and of uncertain authority, maintains a dead-alive existence, is a state of things which it is by no means easy to praise.

"Legislation thus being necessary, in what direction is legislation to proceed? A gentleman, for whose opinion upon all subjects connected with Indian law and legislation I, in common with most other people, have a profound respect, said to me the other day in discussing this subject: "my Evidence Bill would be a very short one. It would consist of one rule, to this effect—All rules of evidence are hereby abolished." I believe that the opinion thus vigorously expressed is really held by a large number of persons who would not avow it so plainly. There is, in short, in the lay world, including in the expression the majority of Indian civilians, an impression that rules of evidence are technicalities invented by lawyers principally for what Bentham called fee-gathering purposes, and of no real value in the investigation of truth. I cannot admit that this impression is in any degree correct. I believe that rules of evidence are of very great value in all inquiries into matters of fact, and in particular in inquiries for judicial purposes; and that it is practically impossible to investigate difficult subjects without regard to them.

"It is worth while to illustrate this point a little, because the necessity for rules of evidence rests upon it; but strong proof of it is to be found in the fact that in all ages and countries there have been rules of evidence. In rude times and amongst primitive people, the task of arriving at the truth as to matters of fact was regarded as so hopeless and difficult, that rude arbitrary substitutes for any sort of rational procedure were provided in the shape of ordeals and judicial combats. Where people began to obtain glimpses of the true methods of investigation, they seem to have considered as almost supernatural skill what in our days would fall within the scope of average police officers or attorneys' clerks. The delighted wonder which was displayed by the Jews, according to the apocryphal story of Susannah and the Elders, at what a legal friend of mine used to call 'that very feeble cross-examination of Daniel's about the trees,' is a good instance of this. At a later period, arbitrary rules of evidence began to be formed. Such a fact must be proved by two eye-witnesses; such another by four; such another by seven. To say nothing of

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European systems, in which such rules were in force, the Hedaya is full of them. These rules were never introduced in their full force into England, but the system which was adopted, or rather which grew up by degrees, was of a very mixed and exceedingly singular character. Part of it consisted of rules declaring large classes of witnesses to be incompetent. Part was intimately connected with the English system of special pleading, which was so contrived as to define with extreme precision the facts upon which the parties differed, or were, as the phrase goes, at issue. Part were the result of the practical experience of the Courts, and these were by far the most valuable portion, in my opinion, of the English Law of Evidence. Most of the other rules have indeed been cut away by legislation, and the rules which still remain may fairly be taken to be the nett result of English judicial experience in modern times. In the most general terms, these rules are—

1, that evidence must be confined to the issue ;
2, that hearsay is no evidence ;
3, that the best evidence must be given ;
4, rules as to confessions and admissions ;
5, rules as to documentary evidence.

"I have two general remarks to make upon them.

"The first is that they are sound in substance and eminently useful in practice, and that, when properly understood, they are calculated to afford invaluable assistance to all who have to take part in the administration of justice.

"The second is that I believe that no body of rules upon any important subject were ever expressed so loosely, in such an intricate manner, or at such intolerable length.

"It is necessary to prove the first of these propositions, in order to justify the recommendation of the Committee that the substance of the rules in question should be introduced in the form of express law into this country. It is necessary to prove the second proposition, in order to justify the attempt made in the Bill to reduce the rules to order and system.

"First, then, as to the proposition that the rules in question are substantially sound, and do far more good than harm, even in their present confused condition. The proof of this is, I think, to be found in a comparison between the proceedings of English Courts of Justice and those of countries which have no such rules, and between the proceedings of English Courts in which these rules are, and those in which they are not, understood and acted upon. As a preliminary remark, I think I ought to observe that the knowledge of these rules possessed by English lawyers is derived far more from the daily practice in the Courts than from theoretical study. Many English lawyers know by habit, almost

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instinctively, whether this or that (to use the common phrase) is or is not evidence, although they have hardly given the theory of the matter a thought. Practice, therefore, and not theory, affords the true test of the value of these rules. In fact, the clumsy, intricate, ambiguous, and in many instances absurd, theory by which the rules of evidence are connected together came after the eminently sagacious practice which they were intended to justify and explain. What is the practical effect of these rules? I may perhaps be permitted to answer this by referring to a book which I published in 1863 on the criminal laws of England, and which contains, amongst other things, an analysis of several celebrated trials, English and French. One object of that analysis was to contrast the effect of the presence and absence of rules of evidence; and I think that any one who would take the trouble to compare those trials together carefully would agree with me in the conclusion that the practical effect of the English rules of evidence in those cases was to shorten the proceedings enormously, and at the same time to consolidate and strengthen them, keeping out nothing that a reasonable person would have wished to have before him as materials for his judgment. The French system, on the other hand, which dispenses with all rules of evidence got, at least in those cases, no other result from the want of them than floods of irrelevant gossip and collateral questions enough to confuse and bewilder the strongest head. Again, compare the proceedings of an ordinary Court of criminal justice with the proceedings of a court-martial, in which rules of evidence are far less strictly enforced and less clearly understood. An ordinary criminal Court never gets very far from the point, but a court-martial continually wanders into questions far remote from those which it was assembled to try. Nothing, for instance, is more common than to see the prosecutor change places, as it were, with the prisoner, or to find collateral issues pursued till the Court finds itself engaged in determining, not whether A was guilty of a military offence, but whether *Z* told a falsehood on some perfectly irrelevant subject. In a case which I well recollect, B testified against A. B being cross-examined to his credit stated a fact not otherwise relevant to the inquiry. Z denied the fact which B affirmed, and made further statements which were contradicted by intermediate letters of the alphabet. No Judge can possibly be expected, by the mere light of nature, to know how to set limits to the enquiries in which he is engaged; yet if he does not, an incalculable waste of time and energy, and a great weakening of the authority of his Court, is sure to follow. Active and zealous advocates, who have no rules of evidence to restrain their zeal, would have it in their power to pervert the

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administration of justice to the basest purposes, and to inflict immense injury on every class connected with it, directly or remotely: that might, and often would, in such hands be made the excuse for tearing open old quarrels and reviving questions laid at rest, and giving fresh animus to scandals long since exploded; and the main question would frequently be lost sight of in a cloud of irritating and useless collateral issues. I may be excused for referring to my own experience at the Bar in illustration of this. Appeals against orders of affiliation used invariably to produce an amount of perjury and counter-perjury which I should think it would be difficult to exceed in any country. In certain parts of the country, it was a point of honour for the friends of the putative father and of the mother, respectively, to 'go to session to swear for him, or her,' as they used to say. No one who did not take part in such cases could imagine the strange ramifications of falsehood and contradiction into which a hotly-contested case of this kind would spread, or the number of imputations thrown on the honesty and chastity of the different witnesses, male and female. If it had not been for the rules of evidence, the reputations of half the population of the village would have been torn in pieces. The rules of evidence kept matters to a point, and so minimized the evil; but the parties, the witnesses, and the attornies, all appeared to me to be, one more anxious than another, to fight the matter out till the very last rag of character had been stripped off the back of every man, woman, and child, whose name was in any way brought into the discussion. The French Courts display this evil in an aggravated form. In the work, to which I have already referred, will be found an account of the trial of a monk named Leotade for murder. If disposed of under the English rules of evidence, it could hardly have taken more than a day or two at the most. In the French Court, it lasted for, I think, about three weeks, and branched out into all sorts of subjects. One witness, in particular, was discovered to have seduced a girl seven years before, and letters from her to him were read to throw light on his character. He naturally wished to give his own account of the transactions, but was stopped on the ground that a line must be drawn somewhere, and that the Court chose to draw it between the point at which an irrelevant slur had been thrown on his character and the point at which, had he been permitted to do so, he might have given an equally irrelevant explanation.

"It is not, however, merely for the purpose of confining judicial proceedings within reasonable limits that rules of evidence are useful. They are also of pre-eminent importance for the purpose of protecting and guiding the judge in the discharge of his

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duty. There is a sense in which it may be said with perfect truth that even legislative power is unequal to the task of abolishing rules of evidence. No doubt, it is competent to the legislature to provide that no rules of evidence shall have the force of law; but unless they expressly forbid all Courts and Judges to act upon any rules at all, or to listen to any arguments as to the manner in which they shall exercise the discretion with which they are invested (propositions too absurd to state or to discuss) the judges infallibly will hear, and will be guided by, arguments upon the subject, and these arguments will be drawn from the practice of English Courts. Moreover, the Courts of Appeal will exercise their own discretion in the matter, and thus, by degrees, the system would grow up again in the most cumbrous chaotic and inconvenient of all conceivable shapes. The plain truth is, that there is only one possible way of getting rid of the law of evidence and that is by getting rid of the administration of justice by lawyers and returning to the system of mere personal discretion.

"It may be that some persons would like this policy, but I suppose it is one which I need not discuss.

"So far, I have considered the rules of evidence merely as they conduce to the important practical objects of keeping proceedings to the point, and of protecting and supporting the judges. I must now say a few words on their value as furnishing the judge with solid tests of truth. I fully admit that their value in this respect is often exaggerated and misconceived; but I think that, when the matter is fairly stated, it will be found that they have a real, though it may be described as a negative, value for this purpose. There are two great problems on which the rules of evidence throw no light at all, and on which they are not intended to throw any light; and it must be admitted that those problems are by far the most important of any which a judge has to solve. No rule of evidence that ever was framed will assist a judge in the very smallest degree in determining the master question of the whole subject—whether, and how far, he ought to believe what the witnesses say? Again, rules of evidence are not, and do not profess to be rules of logic. They throw no light at all on a further question of equal importance to the one just stated. What inference ought the judge to draw from the facts in which, after considering the statements made to him, he believes? In every judicial proceeding whatever, these two questions—Is this true, and, if it is true, what then?—ought to be constantly present to the mind of the judge; and it must be admitted, both that the rules of evidence do not throw the smallest portion of light upon them and that persons who are absolutely ignorant of those rules

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may give a much better answer to each of these questions than men to whom every rule of evidence is perfectly familiar. I think that a more or less distinct perception of this, coupled with impatience of the exaggerated pretensions which have sometimes been made on behalf of the rules of evidence, are the principal reasons for the distrust and dislike with which they are at times regarded. This dislike, I think merely a particular application of the vulgar error which in so many instances leads people to deprecate art in comparison with nature; as if there were an opposition between the two and as if art in all cases did not presuppose and depend upon nature. The best shoes in the world will not make a man walk, nor will the best glasses make him see; and in just the same way, the best rules of evidence will not supply the place of natural sagacity or of a taste for and training in logic; but it no more follows that rules of evidence are useless as guides to truth, than that shoes or glasses are useless as assistances to the feet and to the eyes. The real use of rules of evidence in ascertaining the truth consists in the fact that they supply negative tests, warranted by very long and varied experience, as to two great points, the relevancy of facts to the question to be decided by the Court and the sort of evidence by which particular facts ought to be proved. They may in the broadest and most popular form be stated thus:—

"If you want to arrive at the truth as to any matter of fact of serious importance, observe the following maxims:

"First, if your belief in the principal fact which you wish to ascertain is to be, after all, an inference from other facts, let those facts, at all events, be closely connected with the principal fact in some one of certain specific modes. Secondly, never believe in any fact whatever, whether it is the fact which you principally wish to determine, or whether it is a fact from which you propose to infer the existence of the principal fact, until you have before you the best evidence that is to be had; that is to say, if the fact is a thing done, have before you some one who saw it done with his own eyes: if it was a thing said have before you some one who heard it said with his own ears: if it was a written paper, have the paper before you and read it for yourself. This exception—qualifications and explanations apart—is the true essence of the rules of evidence, and I think that no one will deny, either that these rules are in themselves eminently wise, or that they are by no means so obvious and self-evident that the mere unassisted natural sagacity of judicial officers of every grade can be trusted to grasp their full meaning and to apply them to the practical questions which arise in the administration of justice, with no assistance from any express law. I do not wish to

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exaggerate, but I must add, that I attach considerable moral and speculative value to these rules. If they are firmly grasped by Courts of Justice, and rigidly insisted upon in all practical matters which come before the Courts, they will gradually work their way amongst the people at large, and furnish them with tests by which to distinguish between credulity and rational belief upon a great variety of matters which will be of vast importance. I ought to add that the good which they are calculated to effect can be obtained only by erecting them into laws and rigorously enforcing them. When this is done, I feel confident that experience will be continually adding to the proof of their value.

"So far, I have tried to prove the proposition that the English rules of evidence are of real solid value, and that they are not a mere collection of arbitrary subtleties which shackle, instead of guiding, natural sagacity. I pass now to the next proposition, which is, that these rules are expressed in a form so confused, intricate and lengthy, that it is hardly possible for any one to learn their true meaning otherwise than by practice, an inconvenience which may be altogether avoided by a careful and systematic distribution. For the proof of this proposition, if indeed it is disputed, I can only refer in general to the English text-books on the subject. They form a mass of confusion which no one can understand until, by the aid of long practice, he learns the intention of the different rules, of which they heap together innumerable and often incoherent illustrations. I am far from wishing to impute this as a fault to the industrious, and in many cases distinguished, authors of these compilations. They, like all other hand-books, are intended for immediate practical purposes, and are mere collections of enormous masses of isolated rulings, generally relating to some very minute point. It was necessary, therefore, that they should be arranged, rather with reference to vague catch-words with which the ears of lawyers are familiar, than with reference to theoretical principles which it has never been worth any lawyer's while to investigate.

"The condition of the law of evidence, as well as the condition of many other branches of the law of England, affords continual illustrations of the extraordinary intricacy and difficulty which arises from the combination of the very greatest practical sagacity with an absence of sound theory, or, what is still worse, with the presence of unsound theory. No one who has not seen it could possibly imagine how obscure the meaning of a clever man may become when he is forced to squeeze it into the terms of a theory which does not fit it and is not true. I will give one or two illustrations of my meaning. The expression 'hearsay is no evidence' early obtained considerable currency in

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the English Courts. In a general way, its meaning is clear enough, and, what is more, is true; but, when considered as the scientific expression of a general truth, from which rules can be deduced in particular cases, it is inaccurate, faulty, and obscure to the last degree. The objections to it are, that both 'Hearsay' and 'evidence' are words of the most uncertain kind, each of which may mean several different things. For instance, hearsay may mean what you have heard a man say, and this is its most obvious meaning; but it is difficult to imagine a grosser absurdity than the assertion that no one is ever to prove, in a judicial proceeding, any thing said by any other person. 'Hearsay,' again, may be taken to mean that which a person did not perceive with his own organs of perception; but this is not the natural sense of the word, and it is almost impossible in practice to divest a word of its natural meaning.

"The word 'evidence' is also exceedingly ambiguous. It may mean that which a witness says in Court. It may mean facts to which he testifies, regarded as a groundwork for further inference. Notwithstanding this, the phrase 'hearsay is no evidence,' being emphatic and easy to recollect, stuck in the ears and in the minds of lawyers, and has been taken by many text-writers as the principles on which their statement of the most important branch of the law should be arranged. They accordingly took to describe as hearsay every fact of which evidence was by law excluded; in short they turned 'hearsay is no evidence' into 'that which is not evidence is hearsay.' They did not, however, do this expressly; they did it by describing as exceptions to the rule excluding hearsay all cases in which evidence was admitted of anything which would have been excluded but for such exceptions. This is so intricate a statement that I can hardly expect the Council to follow me, but I will give an illustration of what I mean. The question is, whether a piece of land belongs to A or B. A says that it belongs to him, because his father C bought it from D, who bought it from E, and he produces the deeds by which E conveyed the land to D and D conveyed it to C. Now, as D and E are not parties to the suit between A and B and as A cannot of his own knowledge know anything of the transaction between them, English text-writers call the deed between D and E 'hearsay;' and according to Mr. Pitt Taylor, the rule which permits such deeds to be given in evidence is the third exception to the rule which excludes hearsay. One of the Judges, if I am not mistaken, called such evidence 'written hearsay,' and so indifferent are English lawyers in general to the abuse of language for the sake of momentary convenience that it probably never struck him that this was a contradiction

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in terms. I think, however, that it is hard to expect people to understand, bear in mind, and follow out in all its ramifications a system which employs language in such a peculiar manner as to call ancient deeds 'written hearsay.' To talk of hearing a document is like talking of seeing a sound.

"I now turn to the ambiguity of the word 'evidence,' to which I have already referred. As I have just said, 'evidence' sometimes means a fact which suggests an inference. For instance, it is common to say,—'Recent possession of stolen goods is evidence of theft;' that is, the fact of such possession suggests the inference of theft. At other times, and I think more frequently, 'evidence' means what a witness actually says in Court, or that which he produces. For instance, we say the evidence which he gave was true. I might occupy, I will not say the attention, but the time, of your Lordship and the Council for hours if I were to attempt to describe the amount of confusion and obscurity which the neglect of this simple and obvious distinction has thrown over the whole subject. I will content myself with observing that it produces the effect of giving a double meaning to every expression into which the word 'evidence' is introduced. 'Circumstantial evidence,' 'hearsay evidence,' 'direct evidence,' 'primary evidence,' 'best evidence,' have each two sets of meanings, and the result is, that it is almost impossible to arrive at a clear and comprehensive knowledge of the whole subject, or see how its various parts are related to each other, without an amount of study, thought, and practical acquaintance with the actual working of the rules of evidence which few people are in a position to bestow upon the subject.

"I may appear to be detaining the Council unduly upon merely verbal questions, but I think that it is a common fault to under-rate the importance of accurate language, particularly in regard to the fundamental terms of any particular branch of knowledge. In regard to law, I have not the least doubt that a very large proportion of the intricacy and difficulty which attach to it is due to the fact that proper pains have never been bestowed on the definition of its fundamental terms. What could be made of Euclid if we were not quite sure of our meaning when we spoke of a point, a line, a circle, parallels and perpendiculars? such a defect would render geometry impossible, and the defect which makes large parts of the law almost unintelligible, and beyond all measure cumbrous and unwieldy, is precisely analogous to it in principle. I believe that, if its fundamental terms were defined as clearly as the term 'law' was defined by the late Mr. Austin, the study of law would become comparatively easy, and in many cases attractive for its own sake; that its bulk might be diminished to a

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degree of which people in general have hardly any conception; that the expense of its administration might be greatly diminished, and that comparative certainty might do away with a very large amount of needless and harassing litigation.

"I shall now proceed to describe, shortly, the principles on which the Draft Bill of the Committee has been framed. In the first place, we thought it necessary to fix the sense in which the fundamental terms of the subject should be understood, and for that purpose we define 'fact,' 'evidence,' 'proof' 'proved,' and some others as to which I will content myself with a reference to the report. It seemed to us that the remainder of the subject would fall under the following general heads:—

1.—The relevancy of fact to the issues to be proved.

2.—The proof of facts according to their virtue, by oral, documentary, or material evidence.

3.—The production of evidence in Court.

4.—The duties of the Court, and the effect of mistaken admission or rejection of evidence.

"These heads would, we think, be found to embrace, and to arrange in their natural order, all the subjects treated of by English text-writers and judges under the general head of the Law of Evidence. I will say a few words on their relation to each other, and on each of them in turn.

"The main feature of the Bill consists in the distinction drawn by it between the relevancy of facts and the mode of proving relevant facts. The neglect of this distinction by English text-writers, no doubt, arises from the ambiguity of the word 'evidence,' to which I have already referred, and is the main cause of the extreme difficulty of understanding the English law of evidence systematically. I will shortly illustrate my meaning. A says, 'Z committed murder.' First of all this is a fact—something which could be directly perceived by the sense of hearing and distinctly remembered afterwards. Now, whether this fact is or is not relevant in a particular case depends upon a variety of circumstances. If the question is, whether A was guilty of defaming Z by accusing him of murder; or whether Z had a motive for assaulting A because A said that he had committed murder or if Z is accused of murder, and the object is to show that, when A charged him with it he behaved as if he were guilty, and in many other instances which might be put, the fact that A spoke those words is clearly relevant. But if the question is, whether Z actually did commit murder, the fact that A thought so or said so, generally speaking, is not relevant. Supposing, however, that the fact is relevant on some one of the grounds just mentioned, or on any other ground, whatever be the ground on which the words are relevant to the

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matter under inquiry, it is obvious that the words themselves ought to be satisfactorily proved, and the rule of English law—and we think it is a wise rule—is that they must be proved by the assertion of some witness that he heard them said with his own ears. English text-writers throw together these two classes of rules under the head of Hearsay. They lay down the general rule that hearsay is no evidence, meaning by it that certain classes of facts called hearsay are to be treated as irrelevant to the determination of particular questions, and it is necessary to look through a long list of exceptions to that rule in order to see whether, in a particular case, A's statement may or may not be proved. If you find that it can be proved, the question is, how can it be proved? and you propose to prove it by a witness who says that B told him that he heard A say so. Again, you are told, 'hearsay is no evidence;' but this time the expression means, not that the fact is irrelevant, but that the testimony by which it is proposed to prove the fact is improper. One extreme inconvenience of this is, that the most important part of the English law of evidence is thrown into the most intricate and inconvenient of all possible forms, that of a very wide negative, of most uncertain meaning, qualified by a long string of exceedingly intricate exceptions.

"No one who has not gone through the process of learning the law by mere rule-of-thumb practice can imagine the degree of needless obscurity and difficulty upon this point, of the existence of which he becomes gradually conscious. It would be perfectly fair to say to almost any English text-writer, 'you tell me, at enormous length, what is not evidence; but you nowhere tell me what is evidence, except, indeed, in large compilations, which point out what has to be proved upon particular issues, and which it is as impossible to read or remember as it is to read or remember any other mere works of reference.'

"I hope that we have been able to avoid this, and that the second chapter of the Bill will be found to state specifically, and in a positive form, what sorts of facts are relevant, as being sufficiently connected with the facts in issue to afford grounds for an inference as to their existence or non-existence. I will not weary the Council by mentioning those rules, and I will content myself by referring to the Bill and to the report. But I may shortly illustrate them by reference to a passage from a modern historian, which will relieve the dulness of a very technical speech. The passage to which I refer is a short summary, by Mr. Froude, of the grounds on which he believes that Mary Queen of Scots murdered her husband.

"As Mr. Froude is not a lawyer, he certainly wrote what

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I am about to read without reference to rules of evidence. I think the fact that he did, in fact, unconsciously observe them illustrates very strongly the truth of my assertion that they are no more than the result of experience and practical sagacity thrown into a categorical shape. I need hardly say that I use the passage merely as an illustration, and without any notion of adopting Mr. Froude's opinions, or asserting the truth of his facts. I am concerned merely with their relevance.

"She (Mary) was known to have been weary of her husband and anxious to get rid of him.

"(By our draft, facts which show motive are relevant).

"'The difficulty and the means of disposing of him had been discussed in her presence, and she had herself suggested to Sir James Balfour to kill him.'

"(Facts which show preparation for a fact in issue are relevant).

"'She brought him to the house where he was destroyed; she was with him two hours before his death;'

"(Facts so connected with the facts in issue as to form part of the same transaction are relevant).

"'And afterwards threw every difficulty in the way of any examination into the circumstances of his end.'

"(Subsequent conduct influenced by any fact in issue is relevant).

"'The Earl of Bothwell was publicly accused of the murder.

"(Facts necessary to be known in order to introduce relevant facts are relevant).

"'She kept him close at her side; she would not allow him to be arrested; she went openly to Seton with him before her widowhood was a fortnight old. When at last, unwillingly, she consented to his trial, Edinburgh was occupied by his retainers. He presented himself at the Tolbooth surrounded by the Royal Guard, and the charge fell to the ground, because the Crown did not prosecute and the Earl of Lennox had been prevented from appearing.'

"(Subsequent conduct influenced by any fact in issue is relevant).

A few weeks later, she married Bothwell, though he had a wife already, and when her subjects rose in arms against her and took her prisoner, she refused to allow herself to be divorced from him.

"(Subsequent conduct. Motive).

"A large part of the evidence consisted of certain letters which the Queen was said to have written. Mr. Froude, in passages which I need not read, alleges facts which go to show that

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she tried to prevent the production, and to secure the destruction, of these letters. An illustration as to subsequent conduct meets the case of a person who destroys or conceals evidence.

"Finally, Mr. Froude observes: 'In her own correspondence though she denies the crime, there is nowhere the clear ring of innocence which makes its weight felt even when the evidence is weak which supports the words.'

"The letters would be evidence under the section relating to admissions, and Mr. Froude's remark is in nature of a criticism on them by a prosecuting Counsel.

In English text-books, so far as my experience goes, these rules and others of the same sort are nowhere presented in a compact substantive form. They come in, for the most part, as exceptions to the rule that evidence must be confined to the points in issue. In fact, they can be learned only by the practices of the Courts, though they are as natural and lax as any rules need be if they are properly stated.

"From the rules which state what facts may be proved, we pass to those which prescribe the manner in which a relevant fact, must be proved. Passing over technical matters—such as the law relating to judicial notice, questions relating to public documents, and the like—these rules may be said to be three in number, though, of course, numerous introductory rules are required to adopt for practice. They are these—

"1. If a fact is proved by oral evidence, it must be direct; that is to say, things seen must be deposed to by some one who says he saw them with his own eyes. Things heard by some one who says he heard them with his own ears.

"2. Original documents must be produced or accounted for before any other evidence can be given of their contents.

"3 When a contract has been reduced to writing, it must not be varied by oral evidence.

'These rules, as I have said, are subject to certain exceptions, and require certain practical adjustments; but I do not think that any one who has had practical experience of the working of courts of justice will deny their substantial soundness, or indeed the absolute practical necessity for enforcing them.

"Passing over certain matters which are explained at length in the Bill and report, I come to matters to which the Committee attach the greatest importance as having peculiar reference to the administration of justice in India. The first of these rules refers

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to the part taken by the judge in the examination of witnesses the second to the effect of the improper admission or rejection of evidence upon the proceedings in case of appeal.

"That part of the law of evidence which relates to the manner in which witnesses are to be examined assumes the existence of a well-educated Bar, co-operating with the judge and relieving him practically of every other duty than that of deciding questions which may arise between them. I need hardly say that this state of things does not exist in India, and that it would be a great mistake to legislate as if it did. In a great number of cases—probably the vast numerical majority—the judge has to conduct the whole trial himself. In all cases he has to represent the interests of the public much more distinctly than he does in England. In many cases, he has to get at the truth, or as near to it as he can, by the aid of collateral inquiries, which may incidentally tend to something relevant; and it is most unlikely that he should ever wish to push an inquiry needlessly, or to go into matters not really connected with it. We have accordingly thought it right to arm judges with a general power to ask any questions, upon any facts, of any witnesses, at any stage of the proceedings, irrespectively of the rules of evidence binding on the parties and their agents, and we have inserted in the Bill a distinct declaration that it is the duty of the judge, especially in criminal cases, not merely to listen to the evidence put before him, but to inquire to the utmost into the truth of the matter. We do not think that the English theories, that the public have no interest in arriving at the truth, and that even criminal proceedings ought to be regarded mainly in the light of private questions between the prosecutor and the prisoner, are at all suited to India, if indeed they are the result of anything better than carelessness and apathy in England.

"With respect to the question of appeals, we have drawn a series of provisions, the subject of which is to prevent mere mistakes in procedure from destroying the value of work properly done, as far as it goes. We have gone through the various cases in which, as appears to us, the question of the improper admission or rejection or omission of evidence can arise; and have provided, that, whenever any Appellate Court discovers the occurrence of any mistake, it shall not reverse the decision of the inferior Court, but shall either strike out what is redundant, or supply what is defective, as the case may be, and give judgment accordingly.

"I have addressed your Lordship and the Council at great length, but not, I think, at greater length than the importance of the matter requires.

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The Speech of the Hon'ble Fitz-James Stephen delivered on the 12th March 1872 when moving that the Bill should be taken into consideration (which will be found in the Supplement to the Gazette of India for March 30th 1872, p. 230.)

"My Lord—Just a year ago, in submitting the report of the committee to the Council, I explained at very considerable length the general design and scope of the Bill which they proposed, and which is now before the Council for its final decision. I need not revert to what I then said upon the general principles of the subject. My best course, I think, will be to inform the Council of what has taken place in relation to the Bill since I last addressed them on the subject.

"After a very full and careful reconsideration of its various details, the Bill was published in the *Gazette* and forwarded to the Local Governments for opinion. It was carefully reconsidered in committee, after the return of the Government to Calcutta. It was published in the *Gazette* upwards of a month ago, with a report giving an account of the various alterations which had been made in it; and it is now finally submitted for the consideration of the Council. The Committee has fully considered all the papers with which it was favoured; but, with one or two exceptions, I cannot say that it has received any very considerable assistance from its critics. The Bengal Government made some important observations, and so did the Madras Government, which favoured us with two peculiarly valuable papers; one by the then Advocate General, Mr. Norton, and the other in the form of a letter by the Government itself, which had obviously been prepared with the advice and assistance of a very able professional lawyer. We have received no public expression of opinion from any one of the High Courts, except the High Court of Bombay, which approved generally of the Bill, but took exception to two of its provisions on minor points. The High Court of Calcutta announced its intention to say nothing at all on the matter. The High Courts of Madras and Allahabad have, as a fact, said nothing; and as the Bill has been before them for many months, I presume that they do not intend to do so. I have, however, the satisfaction of being able to say that most of the Barrister Judges of the High Courts, and three out of the four Chief Justices, have informed me that they approve generally of the Bill, and regard it as an important improvement on the existing state of things. The Local Governments, I think, are unanimous in regarding

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the measure as one which is much needed, and which is so far suited to its purpose as to be both intelligible to persons not legally trained, and complete in essential respects.

"Upon this point, I would specially refer to the valuable papers already referred to, which have been received from Madras. It is impossible, in reading them, not to see that their authors do not like the Bill. They find every fault they can with it, sometimes coming to very minute criticism. I do not in the least complain of this. I only wish the Bill had been criticised more fully in the same spirit, and I readily admit that the critics in question have pointed out many defects which have been, I think, removed. I am entitled to say that such other defects as may still be latent in it have escaped the detection of at least two highly competent, and by no means favourable critics, who have given the matter careful consideration. Upon some of these criticisms, I will make a few remarks as I go on. I refer to them now for the sake of showing the importance of the opinions which I am about to read.

"The letter of the Madras Government says—

'It is both advisable and possible so to codify the Law of Evidence as to present within the limits of a single enactment a treatise upon that law practically sufficient for ordinary purposes,'

and it then adds—

'The Draft Bill in its scheme and general arrangement appears to furnish an adequate outline of such a Code;'

but it is observed that the Bill 'in its present state is far from complete.'

"Mr. Norton expresses the same opinion at greater length, and each of these authorities agrees in the statement that the Bill is only a skeleton, which will have to be completed by a great number of judicial decisions.

"Mr. Norton criticises the Bill, section by section, and in order to show how fully he has done so, he observes—

'I have, however, compared it, section by section, with Taylor, Roscoe, Best, and other text-writers; with the Civil and Criminal Procedure Codes so far as they apply to the subject of evidence; with some of the existing Acts which regulate judicial evidence, and such judicial decisions as I have access to, illustrating the principles which at present are generally supposed by the Profession to obtain in the Courts of India.'

"He could hardly, I think, have submitted it to a more searching test. Further on, he observes—

'The process by which this Bill has been, in the main, built up, appears to me to have been by following Mr. Pitt Taylor's work on evidence, and arbitrarily selecting certain sections or portions of sections.'

"He then criticises the Bill in detail, and concludes by saying—

'Such are the observations that have occurred to me in the most careful study I can give this Bill; and I think that, with some omissions, a little

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re-arrangement here and there, and considerable extension and enlargement, it promises to prove a great step in advance and improvement in the present uncodified law of evidence, and likely to afford very valuable aid and facilities to the Mofussil Judges, and all concerned in the practice of the law in the Mofussil.'

"The general result of these criticisms is, that the Bill is good as far as it goes, but is very incomplete, and is composed, of scraps of *Taylor on Evidence*, 'arbitrarily,' and much too sparingly, selected. I think I owe to the Council and to the public some observations on this matter. I assert that they do the Bill an injustice; that it is very much more complete than its critics allow it to be; and that their own writings prove it. I will not do Mr. Norton the injustice of supposing that he has intentionally kept back anything of importance which has occurred to him in the Bill. I am therefore entitled to assume that his paper which contains 103 paragraphs and extends over 14 folio pages, refers to all the defects and omissions which his careful study of the subject has brought to his notice. Passing over criticisms of detail, many of which are no doubt just and have been adopted, I find that the only sins of omission with which he charges the Bill are the following:—

"1.—Its provisions as to the effect of judgments are 'meagre.'

"2.—It does not deal fully enough with the subject of presumptions.

"He also suggests slight additions to, or enlargements upon four sections of very subordinate importance, which I will not trouble the Council by referring to.

"The letter from the Madras Government, which describes the Bill as 'far from complete,' specifies no omission whatever, except in reference to the subject of presumptions, more of which it affirms, should be included 'in a Code aiming at completeness.'

"The charge of incompleteness, then, comes to this, that the Bill does not deal fully enough with the two subjects of judgments and presumptions. I will refer to those points hereafter; but I will first, with your Lordship's permission, say a few words on the positive grounds on which I assert that the Bill does form a complete Code, and does deal with every subject which has been dealt with by English text-writers on evidence or by English legislation. This leads me, in the first place, to notice the remark that it consists of bits of *Taylor on Evidence* 'arbitrarily' chosen. There is a certain amount of truth in this charge, about as much truth, and truth of the same kind, as there would be in saying that the speech which I am now making is composed of words arbitrarily chosen out of the dictionary. I could hardly mention any English law-book in common use, which is, or ever

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pretends to be, much more than a large index, made up of extracts from cases strung together with little regard as to any other than a very superficial perfunctory arrangement of the subject-matter. There is always some one book which is in possession of the field at a given moment, because it is more complete than its rivals, and has the latest cases and Statutes entered up in it. This position at present is occupied by Mr. Taylor's book, as it was occupied before his time by Gilbert, Phillips, Starkie and others; and as analagous positions are occupied, in relation to other subjects, by *Russell on Crimes*, *Bullen on Pleading* and other works known to all lawyers. To say, however, that the Bill now before the Council consists of bits taken from Taylor, and especially of bits taken 'arbitrarily,' is altogether incorrect. In the first place, the arrangement of the Bill, and the general conception of the subject on which that arrangement is based, are altogether unlike anything in Taylor or in any other text-book on the subject with which I am acquainted. Nowhere in Taylor, nor in Mr. Norton's own book on the subject, will be found any recognition of the distinction between the relevancy of facts and the proof of facts, or any, even the faintest, perception of the extreme ambiguity and uncertainty which as I showed in the observations which I addressed to the Council a year ago, have been thrown over the whole subject by the absence of anything like an attempt to define with precision the fundamental terms of the subject, and especially the words 'fact' and 'evidence.' As to the notion that bits of Taylor have been 'arbitrarily' put together in the Bill, I will only say that, at a proper time and place, I would undertake to assign the reason why every section stands where it does. Upon the question of completeness, however, I will make this remark: I assert that every principle applicable to the circumstances of British India which is contained in the 1,598 royal octavo pages of *Taylor on Evidence*, is contained in the 167 sections of this Bill: I also assert that the Bill has been carefully compared, section by section, with the last edition of Mr. Norton's work upon evidence, and that it disposes fully of every subject of which Mr Norton treats.

"As to the specific instances of incompleteness which are alleged against the Bill, two only are of any importance, and upon each of them I will say a few words.

"The first is, that the Chapter on Judgments is meagre. My answer is, that it may appear meagre to those who take their notions of the Law of Evidence from works like Mr. Taylor's; but that it contains everything which properly belongs to the subject. Its utter absence of arrangement and classification on every subject is the great reproach of the law of England, and one

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of the strongest instances of it is to be found in the way in which provisions of an essentially different character are frequently comprised under the same head. I might give many illustrations of this; but the Law of Evidence, I think, supplies more glaring illustrations than any other department of law. Many English writers have treated the subject in such a manner as to make it comprise the whole body of the law. Thus, for instance, *Starkie's Law of Evidence* deals with the whole range of the criminal law and of actions for contracts and wrongs His book contains, not merely rules about hearsay and secondary evidence and the like, but a specification of the sort of facts which it is permissible to prove on a charge of murder, or in an action for libel, in order to show malice, or under the plea of not guilty in such an action. It is obvious that the Law of Evidence thus conceived would include nearly the whole of the substantive law, and it follows, I think, that it is of great importance to draw the line distinctly between what properly belongs to the subject and what does not. It is for this reason that the sections about judgments are drawn in their present form, and that certain topics connected with judgments, which are often dealt with by writers on evidence, are omitted from the Bill. The subject is very technical; but I will endeavour to explain it in few words.

"The second section of the Code of Civil Procedure enacts that—

'The Civil Courts shall not take cognizance of any suit brought on a cause of action which shall have been heard and determined by a Court of competent jurisdiction in a former suit between the same parties, or between parties under whom they claim.'

"The Code of Criminal Procedure enacts that a man shall not be tried again after he has once been acquitted or convicted. It is a matter of great difficulty and intricacy to describe the precise effect of these provisions, and to show how they apply to a variety of cases which may arise. Mr. Broughton's edition of the Code of Civil Procedure contians ten large pages, in very small print, of notes of the cases which have been decided on the second section of the Code of Civil Procedure, and a certain number of decisions have been given on the corresponding sections of the Code of Criminal Procedure; and it is beacause this Bill does not codify those decisions that it is described as meagre. My answer to the criticism is, that the authors of the two Codes in question were quite right in considering the matter as essentially a matter of procedure. It no more belongs to the Law of Evidence than a thousand other questions which are sometimes connected with it. There are, for instance, cases in which insanity excuses an act which, but for its existence, would be a crime. If

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a man defends himself on the ground of insanity, he must give evidence of it, just as he must prove the existence of a judgment barring his antagonist's right to sue if he relies on the right's being so barred; but it appears to me that it would be as reasonable to treat the question of the effect of insanity on responsibility as a part of the Law of Evidence, because, in particular cases, it may be necessary to give evidence of insanity, as to treat the law as to the effect of a previous judgment on a right to sue as part of the Law of Evidence, because, in certain cases, it may be necessary to give evidence of the existence of a previous judgment.

"The only questions connected with Judgments, which do appear to me to form part of the Law of Evidence properly so called, are dealt with in sections 40—44 of the Bill. These sections provide for the cases in which the fact that a Court has decided as to a given matter of fact relevant to the issue may be proved for the purpose of showing that that fact exists. This, no doubt, is a branch of the Law of Evidence, and the provisions referred to dispose of it fully.

"As to the subject of Presumptions, my answer to the critics of the Bill is partly to the same effect, though their criticisms were perhaps better founded. I must admit that the Bill as introduced dealt less fully with this subject than was thought desirable on further consideration and some additions to it have accordingly been introduced, though the general principle on which the matter was dealt with is maintained. The subject of presumptions is one of some degree of general interest. It was a favourite enterprise on the part of continental lawyers to try to frame systems as to the effect of presumptions which would spare Judges the trouble of judging of facts for themselves by the light of their own experience and common sense. A Presumption was an artificial rule as to the value and import of a particular proved fact. These presumptions were almost infinite in number and were arranged in a variety of ways. There were rebuttable presumptions, and presumptions which were irrebuttable. *Præsumptiones juris et de jure, Præsumptiones juris, Præsumptiones facti.* There were also an infinite variety of rules for weighing evidence; so much in the way of presumption and so much evidence was full proof, a little less was half-full, and so on. Scraps of this theory have found their way into English law, where they produce a very incongruous and unfortunate effect, and give rise to a good deal of needless intricacy. Another use to which presumptions have been put is that of engrafting upon the Law of Evidence many subjects which in no way belong to it. For instance, there is said to

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conclusive presumption that every one knows the law, and this is regarded as necessary in order to vindicate the further proposition that no one is to be punished for breaking a law of which he was ignorant. To my mind this is simply expressing one truth in the shape of two falsehoods. The plain doctrine, that ignorance of the law is no excuse for breaking it, dispenses with the presumption, and hands the subject over, from the Law of Evidence with which it is accidentally connected, to criminal law to which it properly belongs.

"I will not weary the Council by going into all the details of the subject, thongh I could with perfect ease, if it would not take too long, answer specifically the remark of the Madras Government on this mtter. That Government says—

'Sections 102-4 contain three instances of presumptions, selected from a chapter of the Law of Evidence which in Taylor fills 111 sections. It is difficult to see why any should be inserted when so few are chosen.

"In general terms the answer is this; large parts of Mr. Taylor's chapter relate to topics which have nothing to do with the Law of Evidence. Those which are of practical importance are all iucluded in the Bill as it stands (a few were no deubt omitted in the first draft), and they fall under these heads:—1*st*,—There are a few cases in which it is expedient to provide that one fact shall be conclusive proof of another, for various obvious reasons—the inference of legitimacy from marriage is a good instance. 2*ndly*.—There are several cases in which Courts would be at a loss as to the course which they ought to take under certain circumstances without a distinct rule of guidance. After what length of absence unaccounted for, for instance, may it be presumed that a man is dead? The rule is that seven years is sufficient for the purpose. Obviously, six or eight would do equally well; but it is also obvious that, to have a distinct rule is a great convenience. All cases of this kind fall properly under the head of the Burden of Proof, and I think it will be found that the provisions contained in chapter VII of the Bill provide for all of them. A new section (114) has been added to this Chapter which deserves special notice. Its substance was, I think, implied in the original draft of the Bill; but it has been inserted in order to put the matter beyond all possibility of doubt. It is in the following words—

'114. The Court may presume the existence of any fact which it thinks likely to have happened regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.

Illustrations.

The Court may presume—

(*a*.) That a man who is in possession of stolen goods soon after the

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theft is either the thief or has received the goods knowing them to be stolen, unless he can account for his possession ;

(*b.*) That an accomplice is unworthy of credit, unless he is corroborated in material particulars ;

(*c.*) That a bill of exchange, accepted or endorsed, was accepted or endorsed for good consideration ;

(*d.*) That a thing or state of things which has been shown to be in existence within a period shorter than that within which such things or states of things usually cease to exist, is still in existence ;

(*e.*) That judicial and official acts have been regularly performed ;

(*f.*) That the common course of business has been followed in particular cases ;

(*g.*) That evidence which could be, and is not, produced, would, if produced, be unfavourable to the person who withholds it ;

(*h.*) That if a man refuses to answer a question which he is not compelled to answer by law, the answer, if given, would be unfavourable to him.

(*i.*) That when a document creating an obligation is in the hands of the obligor, the obligation has been discharged.

But the Court shall also have regard to such facts as the following, in considering whether such maxims do or do not apply to the particular case before them :—

As to illustration (*a*)—A shop-keeper has in his till a marked rupee soon after it was stolen, and cannot account for its possession specifically, but is continually receiving rupees in the course of his business.

As to illustration (*b*)—A, a person of the highest character, is tried for causing a man's death by an act of negligence in arranging certain machinery. B, a person of equally good character who also took part in the arrangement, describes precisely what was done, and admits and explains the common carelessness of A and himself :

As to illustration (*b*)—A crime is committed by several persons. A, B and C, three of the criminals, are captured on the spot and kept apart from each other. Each gives an account of the crime implicating D, and the accounts corroborate each other in such a manner as to render previous concert highly improbable :

As to illustration (*c*)—A, the drawer of a bill of exchange, was a man of business. B, the acceptor, was a young and ignorant person, completely under A's influence :

As to illustration (*d*)—It is proved that a river ran in a certain course five years ago, but it is known that there have been floods since that time which might change its course :

As to illustration (*e*) A judicial act, the regularity of which is in question, was performed under exceptional circumstances :

As to illustration (*f*) The question is, whether a letter was received. It is shown to have been posted, but the usual course of the post was interrupted by disturbances ;

As to illustration (*g*)—A man refuses to produce a document which would bear on a contract of small importance on which he is sued, but which might also injure the feelings and reputation of his family :

As to illustration (*h*) A man refuses to answer a question which he is not compelled by law to answer, but the answer to it might cause loss to him in matters unconnected with the matter in relation to which it is asked :

As to illustration (*i*)—A bond is in possession of the obligor, but the circumstances of the case are such that he may have stolen it.'

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"The effect of this provision, coupled with the general repealing clause at the beginning of the Bill is to make it perfectly clear that Courts of justice are to use their own common sense and experience in judging of the effect of particular facts, and that they are to be subject to no technical rules whatever on the subject. The illustrations given are, for the most part, cases of what in English law are called presumptions of law; artificial rules as to the effect of evidence by which the Court is bound to guide its decision, subject, however, to certain limitations which it is difficult either to understand or to apply but which will be swept away by the section in question. I am not quite sure whether, in strictness of speech, the rule that an accomplice is unworthy of credit, unless he is confirmed, can be called a presumption of law, though, according to a very elaborate judgment of Sir Barnes Peacock's it has, at all events, some of the most important characteristics of such a presumption. Be this how it may, the indefinite position in which it stands has been the cause of endless perplexity and frequent failures of justice. On the one hand, it is clear law that a conviction is not illegal because it proceeds on the uncorroborated evidence of an accomplice; on the other hand, it seems to be also law that, in cases tried by a jury, the Judge is bound by law to tell them that they ought not to convict on such evidence, though they can if they choose. How a Sessions Judge (sitting without a jury) is to give himself a direction to that effect, and how a High Court is to deal with a case in which he has convicted, although he told himself that he ought not to convict, I do not quite understand. At all events, it seems to me quite clear that he ought to be at liberty to use his discretion on the subject. Of course, the fact that a man is an accomplice forms a strong objection, in most cases, to his evidence; but every one, I think, must have met with instances in which it is practically impossible to doubt the truth of such evidence, although it may not be corroborated, or although the evidence by which it is corroborated is itself suspicious.

"As I have already observed, I do not wish to trouble the Council with technicalities; but I hope this explanation will show that this part of the Bill, at all events, is not incomplete.

"I may observe that many topics closely connected with the subject of evidence are incapable of being satisfactorily dealt with by express law. It would be easy to dilate upon the theory on which the whole subject rests, and the manner in which an Act of this kind should be used in practice. I think, however, that it would not be proper to do so on the present occasion. I have therefore put into writing what I have to say on these subjects and I propose to publish what I have written, by way of a

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commentary upon, or introduction to, the Act itself. I hope that this may be of some use to the Civil Servants who are preparing for their Indian career, and to the law students in Indian Universities. The subject is one which reaches far beyond law; for the law of evidence is nothing unless it is founded upon a rational conception of the manner in which truth as to all matters of fact whatever ought to be investigated.

"I now turn to a criticism made on the Bill by His Honor the Lieutenant-Governor of Bengal, who appears to be somewhat dissatisfied with the manner in which the Bill deals with the question of relevancy, which as he says, is a question of degree.

'The Lieutenant-Governor has no doubt that the law, clearing up the obscurity now prevailing as to rules of evidence, protecting our Courts from the intrusion of a foreign law of evidence in no way applicable, and rendering the Judges in some degree masters in their own Courts, will be highly beneficial. His principal doubt is, whether it is possible to define by law what evidence is relevant and what is not. He is inclined to think that relevancy is a question of degree; that the relevant shades off into the irrelevant by imperceptible degrees. It may be that it is easier to decide, in each case, what is substantially material to the issue, or so remote in its relevancy that the time of the Court should not be occupied, than to lay down by rule of law what is to be considered relevant and what not. Such rules must necessarily be somewhat refined, and, as it were, metaphysical. If it were allowed to argue the question whether any piece of evidence is, or is not, admissible under such rules, the Lieutenant-Governor would fear that the Court might be lost in disputations. If, however, the rules regarding relevancy be treated as merely an authoritative treatise on evidence for the guidance of Judges, which they are to study and follow as well as they can, but that they are not bound to hear objections and arguments based upon it, the Lieutenant-Governor has no doubt that the rules in the draft are admirably suited to the purpose and would be extremely useful. It does not seem to him very clear in the draft whether or no Counsel are to be entitled to take objection to evidence at every turn, and to argue the question as to whether it is or is not admissible under the evidence rules. It seems of great importance that this should be made clear; for if Counsel may object and argue, the Lieutenant-Governor certainly has great fear that the argumentations regarding relevancy will be endless.'

"I cannot altogether agree with these remarks. As to the arguments of Counsel, I do not feel that horror of them which His Honor appears to feel. It is, I think, abundantly clear that Counsel will be permitted to argue as to the relevancy of evidence, and as to the propriety of proof, and I do not see how a law can be laid down at all upon which Counsel are never to argue. No one I think, will seriously assert that lawyers, as a class, are an impediment to the administration of justice, or otherwise that an all-but-indispensable assistance to it; but if they are to exist at all, they must argue as well on evidence as on other subjects. I must, however, observe that every precaution has been taken to prevent useless and trifling argument. In the first place, if the

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Judge wishes to know about any fact the relevancy of which is under debate. he can cut the matter short by asking about it himself under section 165. In the second place, the mere admission or rejection of improper evidence is not to be a ground for a new trial or the reversal of a decision. The fact that the opposite is the rule in England is the great cause of the enormous intricacy and technicality of English law on this point. If, in the Tichborne case, one single question had been permitted after being objected to, and if the Court had afterwards been of opinion that it had been wrongly permitted, then, however trifling the matter might have been, the party whose objection had been wrongly over-ruled would have been by law entitled to a new trial, and the whole enormous expense of the first trial would have been thrown away. This never was the law in India, or will it be so now. The result is, that the provisions about relevancy will be useful principally as guides to the Judges and the parties, and, in particular, as rules which will enable the Judge to shut out masses of irrelevant matter which the parties are very likely to wish to introduce. As to the more general question, I think that it is possible to give the true theory of the relevancy of facts, and if I thought it desirable to enter upon a very abstract matter in this place, I think I could show what this theory is, and how this Bill is founded upon it. Be this, however, as it may, and taking a view, not indeed less practical, but more immediately and obviously practical I would make the following observations:—I am quite aware that relevancy is, as His Honor observes, a matter of degree, and for that reason the Bill gives definitions of it so wide and various, that I think they will be found to include every sort of fact which has any distinct assignable connection with any matter in issue. The sections which define relevancy are, indeed, enabling sections. Any fact which fulfils any one of the many conditions which they declare to constitute relevancy will be relevant and most facts which have any real connexion with the matter to be proved would fulfil several of them. Take, for instance, this fact—A man is charged with theft and it is proved that he was seen running away immediately after the theft with the stolen goods in his hand. This is (1) a fact so connected with a fact in issue as to form part of the same transaction, and is therefore relevant under section 6; (2) it is the effect of a fact in issue, and is therefore relevant under section 7; (3) it is the conduct of a party to the proceeding subsequent to a fact in issue, and is so relevant under section 8; (4) it is a fact which in itself renders a fact in issue highly probable, and is therefore relevant under section 11. This fact, therefore, is relevant under no less than four sections, each of which would admit a great number of facts which would

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not be admitted by the other sections. Indeed, the latitude of the definition of relevancy will be best appreciated by negativing the conditions which the Act imposes. Suppose that you are able to assert of a fact that it is neither itself in issue, nor forms part of the same transaction, nor is its occasion, cause or effect, immediate or otherwise; that it shows no motive or preparation for it; that it is no part of the previous or subsequent conduct of any person connected with the matter in question; that it does not explain or introduce any fact which is so connected with the matter in question, or rebut or support any inference suggested thereby, or establish the identity of any person or thing connected with it or fix the time of any event the time of which is important; that it is not inconsistent with any relevant fact or facts in issue; and that, neither by itself nor in connection with other facts, does it make any such fact highly probable—if all these negatives can be affirmed, I think we may say, without much risk of error, that the one fact has nothing to do with the other, and may be regarded as irrelevant.

"I now come to a matter which has excited a good deal of discussion, though it relates to a subordinate and not very important part of the Bill—that which concerns the examination of witnesses by Counsel. The Bill as originally drawn provided, in substance, that no person should be asked a question which reflected on his character, as to matters irrelevant to the case before the Court, without written instructions; that if the Court considered the question improper, it might require the production of the instructions; and that the giving of such instructions should be an act of defamation, subject, of course, to the various rules about defamation laid down in the Penal Code. To ask such questions without instructions was to be a contempt of Court in the person asking them, but was not to be defamation.

"This proposal caused a great deal of criticism, and in particular produced memorials from the Bars of the three Presidencies. It was also objected to by most of the Local Governments to whom the Bill was referred for opinion. Some of the objections made to the proposal were, I thought, well founded. It was pointed out, in the first place, that the difficulty of obtaining the written instructions would be practically insuperable; in the next place, that the Native Bar throughout the country were already subject to forms of discipline which were practically sufficient; and, in the third place—and perhaps this was the most important argument of all—that, in this country, the administration of justice is carried on under so many difficulties, and is so frequently abused to purposes of the worst kind, that it is of the greatest importance that the characters of witnesses should be open to

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full inquiry. These reasons satisfied the Committee, and myself amongst the rest, that the sections proposed would be inexpedient, and others have accordingly been substituted for them which I think will in practice be found sufficient. The substituted sections are as follows:—

'146. When a witness is cross-examined, he may, in addition to the questions herein-before referred to, be asked any questions which tend.

(1) to test his veracity;

(2) to discover who he is and what is his position in life, or

(3) to shake his credit, by injuring his character, although the answer to such questions might tend directly or indirectly to criminate him, or might expose, or tend directly or indirectly to expose, him to a penalty or forfeiture.

147. If any such question relates to a matter relevant to the suit or proceeding, the provisions of section 132 shall apply thereto.

148. If any such question relates to a matter not relevant to the suit or proceeding, except in so far as it affects the credit of the witness by injuring his character, the Court shall decide whether or not the witness shall be compelled to answer it, and may, if it thinks fit, warn the witness that he is not obliged to answer it. In exercising its discretion, the Court shall have regard to the following considerations:—

(1). Such questions are proper if they are of such a nature that the truth of the imputation conveyed by them would seriously affect the opinion of the Court as to the credibility of the witness on the matter to which he testifies.

(2). Such questions are improper if the imputation which they convey relates to matters so remote in time, or of such a character, that the truth of the imputation would not affect, or would affect in a slight degree, the opinion of the Court as to the credibility of the witness on the matter to which he testifies.

(3). Such questions are improper if there is a great disproportion between the importance of the imputation made against the witness's character and the importance of his evidence.

(4). The Court may, if it sees fit, draw from the witness's refusal to answer, the inference that the answer, if given, would be unfavourable.

149. No such question as is referred to in section 148 ought to be asked, unless the person asking it has reasonable grounds for thinking that the imputation which it conveys is well-founded.

Illustrations.

(*a*). A barrister is instructed by an attorney or vakil that an important witness is a dacoit. This is a reasonable ground for asking the witness whether he is a dacoit.

(*b*). A pleader is informed by a person in Court that an important witness is a dacoit. The informant, on being questioned by the pleader, gives satisfactory reasons for his statement. This is a reasonable ground for asking the witness whether he is a dacoit.

(*c*). A witness, of whom nothing whatever is known, is asked at random whether he is a dacoit. There are here no reasonable grounds for the question.

(*d*). A witness, of whom nothing whatever is known, being questioned as to his mode of life and means of living, gives unsatisfactory answers. This may be a reasonable ground for asking him if he is a dacoit.

150. If the Court is of opinion that any such question was asked without reasonable grounds, it may, if it was asked by any barrister, pleader,

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vakil. or attorney, report the circumstances of the case to the High Court or other authority to which such barrister, pleader, vakil, or attorney is subject in the exercise of his profession.

151. The Court may forbid any questions or enquiries which it regards as indecent or scandalous, although such questions or inquiries may have some bearing on the questions before the Court, unless they relate to facts in issue, or to matters necessary to be known in order to determine whether or not the facts in issue existed.

152. The Court shall forbid any question which appears to it to be intended to insult or annoy, or which, though proper in itself, appears to the Court needlessly offensive in form.'

"The object of these sections is to lay down, in the most distinct manner, the duty of Counsel of all grades in examining witnesses with a view to shaking their credit by damaging their character. I trust that this explicit statement of the principles according to which such questions ought or ought not to be asked, will be found sufficient to prevent the growth, in this country, of that which in England has on many occasions been a grave scandal. I think that the sections, as far as their substance is concerned, speak for themselves, and that they will be admitted to be sound by all honourable advocates and by the public. I cannot leave the subject without a few remarks on the memorials which the sections originally proposed have called forth from the Bar in various parts of the country. As none of the bodies in question have made any further remarks on the Bill, since it appeared in the Gazette in its amended form about a month ago, I suppose that the alterations made in the Bill have removed the main objections which they felt to it. I need not therefore notice those parts of their memorials which were directed against the consequences which they apprehended from the sections which have been given up. They contain, however, other matter which I feel compelled to notice. I need not refer to all the memorials. The one sent in by the Calcutta Bar was for the most part proper, though it contained passages which I think might as well have been omitted. The memorial of the Bombay Barristers contains similar passages, expressed more fully and less temperately, and I shall accordingly confine myself to noticing such of their remarks as appear to me to deserve notice.

"I may observe, in the first place, in general, that I have read in the newspapers and in these memorials much that can only mean that I individually was actuated in drawing this Bill by hostility to the Bar; indeed, the Bombay memorial says, in so many words, that remarks made by one member (meaning, I suppose, me) in Council 'appear to contemplate the extinction of the profession of Barrister-at-law in India.' In support of this surprising statement, they quote, as being 'open to no other

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construction,' the following words from the report of the Select committee:—

'The English system, under which the Bench and Bar act together and play their respective parts independently, and the professional organization on which it rests, does not as yet exist in this country, and will not, for a very long course of time be introduced.'

"Before I make the remarks which this suggests, let me ask your Lordship and the Council whether a charge that I, of all people, wish for the extinction of the profession of Barrister-at-law in India, is not upon the face of it absurd; I am myself a Barrister of eighteen years' standing, and a Queen's Conusel of four years' standing. I believe that there is no Barrister in British India of whom I should not be entitled to take precedence, professionally if I chose to practice here; and so strong is my connection with my profession, that I am at this moment on the point of resigning one of the most responsible offices which a Barrister can hold, for the purpose of returning to the ordinary routine of professional practice. How is it possible to imagine that a man so situated should be hostile to the profession? When the Bill was introduced I was—as I still am—anxious to do whatever lies in my power to preserve the honor and dignity of my profession, and to prevent its good name, from being disgraced. For this reason, I devised what I regarded as an appropriate remedy for a great and crying evil; one with which I have been much impressed by my own observation in England, and which is likely to extend in India as the habit of cross-examination becomes more general, and when the rights which a cross-examining advocate has are explicitly defined. The remedy, I will admit, was to some extent inappropriate; but for merely proposing it, for merely recognizing the existence of the evil against which it was directed, I am charged with wishing to extinguish my own profession.

"The real meaning of the expressions in the report (for which I am fully responsible) was, I think, so plain, that I cannot understand how the memorialists can have ascribed to them a sense which I think they could never suggest to any fair mind. The report said—

'The English system, under which the Bench and the Bar act together and play their respective parts independently, and the professional organization on which it rests, does not as yet exist in this country, and will not for a very long course of time be introduced.'

"'Yes,' say the memorialists, 'it does exist, to wit, in the Presidency towns.' This is much as if the water-works of Calcutta were referred to, to contradict a statement that India is wretchedly supplied with drinking water. I make a statement about an Empire as large as Europe without Russia, and am told that it is incorrect, because there are three English Courts, and

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three knots of, perhaps, a dozen or so English Barristers, to be found at towns which are in the nature of English settlements. The reason why the statement complained of was not qualified by excepting these towns and Courts was simply that the exception was not important enough to be stated. It would, indeed, have been matter of great indifference to me, personally, whether the Bill extended to the High Courts sitting on the original side or not. It is a mistake to make exceptions without a necessity for them; but the question, what rules of evidence should apply in the Presidency towns, is one of very little real importance. The great and vital importance of the matter lies in the effect which it will have on the administration of justice throughout the country at large. It is framed in order to meet the wants, and lighten the labours, of district officers, by giving them a short and clear view of a subject which has been converted into a sort of professional mystery, the knowledge of which was confined to a knot of persons specially initiated in it. Now, as regards the Mofussil, I repeat the expressions complained of. I assert that they are absolutely true, and state a fact notorious to every one. I say that, throughout India generally, nothing like the English system under which the Bench and Bar act together and play their respective parts independently does now exist, or can for a length of time be expected to exist. Let me just re-call for a moment the nature of that system. In the first place, the Bench and the Bar in England form substantially one body. The Judges have all been Barristers, and the great prize to which the Barristers look forward is to become Judges. That is not the case in India, nor anything like it. The great mass of Indian Judges are not, and never have been, lawyers at all; the great mass of Indian lawyers have no chance or expectation of becoming Judges, and many of them have no wish to do so. Even in the Presidency towns, the whole organization of the profession differs from that of England, in ways which I do not think it necessary to refer to, but which are of great importance. I may, however, observe that the position of an English Barrister who practises in the Mofussil, whether he is habitually resident in a presidency town or not, is altogether different from that of an English Barrister in his ordinary practice in England. An English Barrister on Circuit, and even at the Quarter Sessions, is subject to a whole series of professional restraints and professional rules, which do not, and cannot, apply to practice in the Mofussil in this country. He acts under the eyes of a public which takes great interest in his proceedings, and puts a powerful check upon them. He practises in important cases before Judges whom he feels and knows to be his professional superiors, and to whom he is accustomed to defer,

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No one of these remarks applies to a Barrister from a Presidency practising in the Mofussil. The result of this state of things must be matter of opinion. It is impossible to discuss the subject in detail. The Bombay and Calcutta memorialists consider it eminently satisfactory: let us hope they are right. My opinion, of course, is formed upon grounds which it is not very easy to assign, and, as it can be of little importance, I shall not express it. In any case this Bill can do no harm.

"Passing, however, from the case of English Barristers to the case of pleaders and vakils, and the Courts before which they practise, I would appeal to every one who has experience of the subject, whether the observations referred to are not strictly true, and whether the main provision founded upon them—the provision which empowers the Court to ask what question it pleases—is not essential to the administration of justice here. In saying that the Bench and the Bar in England play their respective parts independently, what I mean is that, in England, cases are fully prepared for trial before they come into Court, so that the Judge has nothing to do but to sit still and weigh the evidence produced before him. In India, in an enormous mass of cases, this neither is nor can be so. It is absolutely necessary that the Judge should not only hear what is put before him by others, but that he should ascertain by his own inquiries how the facts actually stand. In order to do this, it will frequently be necessary for him to go into matters which are not themselves relevant to the matter in issue, but may lead to something that is, and it is in order to arm Judges with express authority to do this that section 165 which has been so much objected to, has been framed.

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ADDENDA AND CORRIGENDA.

———o———

Page 10, 3rd line from bottom for "parties" read "party."

Page 25, 18th line from bottom for "voluntary" read "voluntarily made."

Add to notes to s. 34 on page 40 "Factory books cannot be used as independent primary evidence of the payment to which the entries refer. *Queen v. Hurdeep Sahoy* (23 W. R., Cr., 27.)

Page 31, 7th line from bottom for "larger" read "longer."

Page 45, 14th line from top after "it" read "is."

Page 49, 22nd line from top for "conviction" read "convictions."

Page 53, 25th line from top for "counterpart" read "counterparts."

Page 71, s. 92, proviso 1 after the word "illegality" read "want of due execution."

Page 73, 16th line from bottom for "(I. L. R., Bom., (594)" read "(I. L. R., 4 Bom., 594.)"

Page 91, 10th line from bottom for "Baksu" read "Bakshu."

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PREFACE.

THIS is an attempt to publish a most important Act of the Legislature with notes showing the construction put on the different sections by the Highest Courts in the land, at a price which shall be within the reach of all who are engaged either in the decision or in the conduct of civil and criminal cases.

The Editor has spared neither time nor pains to make the notes accurate and trustworthy. He has also with the notes incorporated, in their appropriate places, the provisions of the Civil and Criminal Procedure Codes relating to the examination of witnesses and of accused persons, and to confessions, as well as the decisions relating to the right of accused persons to recall and cross-examine the witnesses for the prosecution after the charge has been framed.

It was at first the design of the Editor to incorporate with this work extracts from a valuable work by Mr. Harris, a Barrister, entitled Hints on Advocacy, which extracts contained shrewd and clever hints and suggestions as to the way of examining, cross-examining and re-examining witnesses, the best way of dealing with different classes of witnesses and of breaking down a false plea of alibi; on further consideration it appeared to the Editor to be wrong to appropriate the fruit of another man's labours and Mr. Harris's little book deserves better treatment than to be mangled by extracts. It is hoped that purchasers of this book will accept the foregoing statement as a satisfactory apology for the absence of what would doubtless have enhanced its value.

So far as the Editor is aware, not a single case referring to or in any way bearing on the construction of this Act and published

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in the reports prior to the issue of this book from the Press has been omitted.

In many instances, whenever, in fact, the decisions have appeared to elucidate the Act they have been quoted at some length; and, in all instances, as much of the special facts, on which the decision of the case with reference to the subject of this work turned, have been fully set forth.

It having been suggested that the addition of Sir James Stephen's two speeches, delivered on the occasion of presenting the report of the Special Committee on the Indian Evidence Bill and on the occasion of moving that the Bill be taken into consideration and passed into law, would be acceptable to the Native members of the legal profession, these Speeches have been added as a kind of introduction to the Act itself. Perhaps, this may be accepted as a set off for the omission of the hints above referred to.

The Editor is conscious that he has not attained the standard set before himself of what such a book should be; but he will be perfectly well pleased if those purchasing this book are satisfied that they have obtained the full value of the trifling outlay incurred in the purchase thereof.

The Editor's grateful ackowledgments are due to his friends Mr. R. Belchambers, the Registrar, on its Original side, of the High Court, Mr. G. S. Henderson, Editor of the Calcutta Law Reports, and Messrs. Beeby and Rutter, Solicitors, for their kindness most courteously rendered in lending books to him; and to Mr. W. A. Bion, the Assistant Secretary and Librarian of the Asiatic Society of Bengal, for the care with which he has prepared the Index, a feat, which all will admit, does credit to a person who has accomplished it without the assistance of professional training.

No. 7, Old Post Office Street,
Calcutta:
1st September 1882.

C. G. LEWIS,
Attorney and Vakeel
of the High Court.

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ACT No. I. OF 1872.

PASSED BY THE GOVERNOR-GENERAL OF INDIA IN COUNCIL.

(Received the assent of the Governor-General on the 15th March 1872.)

THE INDIAN EVIDENCE ACT, 1872.

WHEREAS it is expedient to consolidate, define and amend the Law of Evidence; It is hereby enacted as follows:—

Preamble.

PART I.

RELEVANCY OF FACTS.

CHAPTER I.

PRELIMINARY.

Short title.

1. This Act may be called the "The Indian Evidence Act, 1872:"

Extent.

It extends to the whole of British India, and applies to all judicial proceedings in or before any Court, including Courts Martial, but not to affidavits presented to any Court or Officer, nor to proceedings before an arbitrator;

Commencement of Act.

and it shall come into force on the first day of September 1872.

Note.

This Act has been amended by Act XVIII of 1872. The changes made in the various sections are indicated by italics.

The provisions as to affidavits will be found in Chapter XVI and as to arbitration proceedings in Chapter XXXVII of the present Civil Procedure Code (Act XIV of 1882).

Repeal of Enactments.

2. On and from that day the following laws shall be repealed:—

(1) All rules of evidence not contained in any Statute, Act or Regulation in force in any part of British India:

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(2) All such rules, laws and regulations as have acquired the force of law under the twenty-fifth section of 'The Indian Councils' Act, 1861,' in so far as they relate to any matter herein provided for; and

(3) The enactments mentioned in the schedule hereto, to the extent specified in the third column of the said schedule.

But nothing herein contained shall be deemed to affect any provision of any Statute, Act or Regulation in force in any part of British India and not hereby expressly repealed.

Note.

Sec. 12 of Act XVIII of 1872 provided that nothing in this Act should be deemed to affect Section 12 of Act XV of 1852; but this last section was repealed by Section 2 of Act X of 1873.

In *Ganges Manufacturing Co. v. Soorujmull* (5. C. L. R. 533-42) it was held that this Section did not debar the plaintiffs from availing themselves of a rule of estoppel not contained in Chapter VIII.

Interpretation-clause.

3. In this Act the following words and expressions are used in the following senses, unless a contrary intention appears from the context :—

"Court."

"Court" includes all Judges and Magistrates and all persons, except arbitrators, legally authorized to take evidence.

"Fact."

"Fact" means and includes—

(1) any thing, state of things, or relation of things, capable of being perceived by the senses;

(2) any mental condition of which any person is conscious.

Illustrations.

(*a.*) That there are certain objects arranged in a certain order in a certain place, is a fact.

(*b.*) That a man heard or saw something is a fact.

(*c.*) That a man said certain words is a fact.

(*d.*) That a man holds a certain opinion, has a certain intention, acts in good faith, or fraudulently, or uses a particular word in a particular sense, or is or was at a specified time conscious of a particular sensation, is a fact.

(*e.*) That a man has a certain reputation is a fact.

"Relevant."

One fact is said to be relevant to another when the one is connected with the other in any of the ways referred to in the provisions of this Act relating to the relevancy of facts.

"Facts in issue."

The expression "Facts in issue" means and includes :— any fact from which, either by itself or in connection with other facts, the existence, non-existence, nature, or extent of any right, liability, or disability, asserted or denied in any suit or proceeding necessarily follows :—

Explanation.—Whenever under the provisions of the law

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for the time being in force relating to Civil Procedure, any Court records an issue of fact, the fact to be asserted or denied in the answer to such issue, is a fact in issue.

Illustrations.

A is accused of the murder of B.
At his trial the following facts may be in issue :—
That A caused B's death ;
That A intended to cause B's death ;
That A had received grave and sudden provocation from B ;
That A, at the time of doing the act which caused B's death, was, by reason of unsoundness of mind, incapable of knowing its nature.

"Document" means any matter expressed or described upon any substance by means of letters, figures, or marks, or by more than one of those means, intended to be used, or which may be used, *for the purpose of recording that matter.*

"Document"

Illustrations.

A writing is a document :
Words printed, lithographed or photographed are documents :
A map, or plan is a document :
An inscription on a metal plate or stone is a document :
A caricature is a document.

Note.

This definition corresponds with the definition of document in Sec. 29 of the Penal Code with three exceptions. (1) The seven words italicised have been substituted for "as Evidence of that matter." (2) The two explanations have been omitted. (3) The illustrations are different.

"Evidence" means and includes:—

"Evidence."

(1) all statements which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry ;

such statements are called oral evidence ;

(2) all documents produced for the inspection of the Court ; such documents are called documentary evidence.

A fact is said to be proved when, after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists.

"Proved."

A fact is said to be disproved when, after considering the matters before it, the Court either believes that it does not exist, or considers its non-existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it does not exist.

"Disproved."

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"Not proved." A fact is said not to be proved when it is neither proved nor disproved.

"May presume." 4. Whenever it is provided by this Act that the Court may presume a fact, it may either regard such fact as proved, unless and until it is disproved or may call for proof of it.

"Shall presume." Whenever it is directed by this Act that the Court shall presume a fact, it shall regard such fact as proved, unless and until it is disproved.

"Conclusive proof." When one fact is declared by this Act to be conclusive proof of another, the Court shall, on proof of the one fact, regard the other as proved, and shall not allow evidence to be given for the purpose of disproving it.

CHAPTER II.

OF THE RELEVANCY OF FACTS.

Evidence may be given of facts in issue and relevant facts. 5. Evidence may be given in any suit or proceeding of the existence or non-existence of every fact in issue and of such other facts as are hereinafter declared to be relevant, and of no others.

Explanation.—This section shall not enable any person to give evidence of a fact which he is disentitled to prove by any provision of the law for the time being in force relating to Civil Procedure.

Illustrations.

(*a.*) A is tried for the murder of B by beating him with a club with the intention of causing his death.

At A's trial the following facts are in issue.

A's beating B with the club;

A's causing B's death by such beating;

A's intention to cause B's death.

(*b.*) A suitor does not bring with him, and have in readiness for production at the first hearing of the case, a bond on which he relies. This section does not enable him to produce the bond or prove its contents at a subsequent stage of the proceedings, otherwise than in accordance with the conditions prescribed by the Code of Civil Procedure.

Note.

The statement of a witness for the defence that a witness for the prosecution was at a particular place at a particular time, and consequently could not then have been at another place where the latter states he was and saw the accused persons, is properly admissible in evidence, even though the witness for the prosecution may not himself have been cross-examined on the point, under this section and sections 11 and 153 ill. (c). *Reg. v. Sakharam Mukundji and three others.* (11 Bom. H. C. Rep., 166).

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See also the decision of *Mitter, J.*, in *Empress v. M. J. Vyapoora Moodiliar* (8. C. L. R. 197 : I. L. R., 6 Cal., 655) quoted under s. 14 post.

Relevancy of facts forming part of same transaction.

6. Facts which, though not in issue, are so connected with a fact in issue as to form part of the same transaction, are relevant, whether they occurred at the same time and place or at different times and places.

Illustrations.

(*a.*) A is accused of the murder of B by beating him. Whatever was said or done by A or B or the by-standers at the beating or so shortly before or after it as to form part of the transaction, is a relevant fact.

(*b.*) A is accused of waging war against the Queen by taking part in an armed insurrection in which property is destroyed, troops are attacked, and gaols are broken open. The occurrence of these facts is relevant, as forming part of the general transaction, though A may not have been present at all of them.

(*c.*) A sues B for a libel contained in a letter forming part of a correspondence. Letters between the parties relating to the subject out of which the libel arose, and forming part of the correspondence in which it is contained, are relevant facts, though they do not contain the libel itself.

(*d.*) The question is, whether certain goods ordered from B were delivered to A. The goods were delivered to several intermediate persons successively. Each delivery is a relevant fact.

Note.

See the decision of *Mitter, J.*, in *Empress v. M. J. Vyapoora Moodiliar* (8 C. L. R, 197 ; I. L. R, 6 Cal., 655) quoted under s. 14 post.

Facts which are occasion, cause or effect of facts in issue.

7. Facts which are the occasion, cause, or effect immediate or otherwise, of relevant facts, or facts in issue, or which constitute the state of things under which they happened, or which afforded an opportunity for their occurrence or transaction, are relevant.

Illustrations.

(*a.*) The question is, whether A robbed B.

The facts that, shortly before the robbery, B went to a fair with money in his possession, and that he showed it, or mentioned the fact that he had it, to third persons, are relevant.

(*b.*) The question is, whether A murdered B.

Marks on the ground, produced by a struggle at or near the place where the murder was committed, are relevant facts.

(*c.*) The question is whether A poisoned B .

The state of B's health before the symptoms ascribed to poison, and habits of B, known to A, which afforded an opportunity for the administration of poison, are relevant facts.

Motive, preparation and previous or subsequent conduct.

8. Any fact is relevant which shows or constitutes a motive or preparation for any fact in issue or relevant fact.

The conduct of any party or of any agent, to any suit or proceeding, in reference to such suit or proceeding, or in reference to any fact in issue therein or relevant thereto, and the

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conduct of any person, an offence against whom is the subject of any proceeding, is relevant, if such conduct influences or is influenced by any fact in issue or relevant fact, and whether it was previous or subsequent thereto:

Explanation 1.—The word "conduct" in this section does not include statements, unless those statements accompany and explain acts other than statements; but this explanation is not to affect the relevancy of statements under any other section of this Act.

Explanation 2.—When the conduct of any person is relevant, any statement made to him or in his presence and hearing which affects such conduct, is relevant.

Illustrations.

(a.) A is tried for the murder of B.

The facts that A murdered C, that B knew that A had murdered C, and that B had tried to extort money from A by threatening to make his knowledge public, are relevant.

(b.) A sues B upon a bond for the payment of money. B denies the making of the bond.

The fact that, at the time when the bond was alleged to be made, B required money for a particular purpose, is relevant.

(c.) A is tried for the murder of B by poison.

The fact that, before the death of B, A procured poison similar to that which was administered to B, is relevant.

(d.) The question is, whether a certain document is the will of A.

The facts that, not long before the date of the alleged will, A made inquiry into matters to which the provisions of the alleged will relate; that he consulted vakils in reference to making the will, and that he caused drafts of other wills to be prepared, of which he did not approve, are relevant.

(e.) A is accused of a crime.

The facts that, either before, or at the time of, or after the alleged crime, A provided evidence which would tend to give to the facts of the case an appearance favourable to himself or that he destroyed or concealed evidence, or prevented the presence or procured the absence of persons who might have been witnesses, or suborned persons to give false evidence respecting it, are relevant.

(f.) The question is, whether A robbed B.

The facts that, after B was robbed, C said in A's presence—'the police are coming to look for the man who robbed B,' and that immediately afterwards A ran away, are relevant.

(g.) The question is, whether A owes B rupees 10,000.

The facts that A asked C to lend him money, and that D said to C in A's presence and hearing—'I advise you not to trust A for he owes B 10,000 rupees,' and that A went away without making any answer, are relevant facts.

(h.) The question is whether A committed a crime.

The fact that A absconded after receiving a letter warning him that inquiry was being made for the criminal, and the contents of the letter are relevant.

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(i.) A is accused of a crime.

The facts that, after the commission of the alleged crime, he absconded, or was in possession of property or the proceeds of property acquired by the crime, or attempted to conceal things which were or might have been used in committing it, are relevant.

(j.) The question is, whether A was ravished.

The facts that, shortly after the alleged rape, she made a complaint relating to the crime, the circumstances under which, and the terms in which, the complaint was made, are relevant.

The fact that, without making a complaint, she said that she had been ravished is not relevant as conduct under this section, though it may be relevant

as a dying declaration under section thirty-two, clause (one) or as corroborative evidence under section one hundred and fifty-seven.

(k) The question is, whether A was robbed.

The fact that, soon after the alleged robbery, he made a complaint relating to the offence, the circumstances under which, and the terms in which the complaint was made, are relevant.

The fact that he said he had been robbed, without making any complaint is not relevant as conduct under this section, though it may be relevant

as a dying declaration under section thirty-two, clause (one) or as corroborative evidence under section one hundred and fifty-seven.

Note.

Sec. 157 says in order to corroborate the testimony of a witness, any former statement made by such witness relating to the same fact, at or about the time when the fact took place, or before any authority legally competent to investigate the fact, may be proved.

See decision of *Mitter, J.*, in *Empress v. M. J. Vyapoora Moodiliar* (8. C. L. R., 197 ; I. L. R., 6 Cal., 655) quoted under Sec. 14 post.

Facts necessary to explain or introduce relevant facts.

9. Facts necessary to explain or introduce a fact in issue or relevant fact, or which support or rebut an inference suggested by a fact in issue or relevant fact, or which establish the identity of any thing or person whose identity is relevant, or fix the time or place at which any fact in issue or relevant fact happened, or which show the relation of parties by whom any such fact was transacted, are relevant in so far as they are necessary for that purpose.

Illustrations.

(a.) The question is, whether a given document is the will of A.

The state of A's property and of his family at the date of the alleged will may be relevant facts.

(b.) A sues B for a libel imputing disgraceful conduct to A; B affirms that the matter alleged to be libellous is true.

The position and relations of the parties at the time when the libel was published may be relevant facts as introductory to the facts in issue.

The particulars of a dispute between A and B about a matter unconnected with the alleged libel are irrelevant, though the fact that there was a dispute may be relevant if it affected the relations between A and B.

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(*c.*) A is accused of a crime.

The fact that, soon after the commission of the crime, A absconded from his house, is relevant, under section eight, as conduct subsequent to and affected by facts in issue.

The fact that, at the time when he left home, he had sudden and urgent business at the place to which he went, is relevant, as tending to explain the fact that he left home suddenly.

The details of the business on which he left are not relevant, except in so far as they are necessary to show that the business was sudden and urgent.

(*d.*) A sues B for inducing C to break a contract of service made by him with A. C, on leaving A's service, says to A— 'I am leaving you because B has made me a better offer.' This statement is a relevant fact as explanatory of C's conduct, which is relevant as a fact in issue.

(*e.*) A, accused of theft, is seen to give the stolen property to B, who is seen to give it to A's wife. B says, as he delivers it—'A says you are to hide this.' B's statement is relevant as explanatory of a fact which is part of the transaction.

(*f.*) A is tried for a riot and is proved to have marched at the head of a mob. The cries of the mob are relevant as explanatory of the nature of the transaction.

Things said or done by conspirator in reference to common design.

10. Where there is reasonable ground to believe that two or more persons have conspired together to commit an offence or an actionable wrong, anything said, done or written by any one of such persons in reference to their common intention, after the time when such intention was first entertained by any one of them, is a relevant fact as against each of the persons believed to be so conspiring, as well for the purpose of proving the existence of the conspiracy as for the purpose of showing that any such person was a party to it.

Illustration.

Reasonable ground exists for believing that A has joined in a conspiracy to wage war against the Queen.

The facts that B procured arms in Europe for the purpose of the conspiracy. C collected money in Calcutta for a like object, D persuaded persons to join the conspiracy in Bombay, E published writings advocating the object in view at Agra, and F transmitted from Delhi to G at Cabul the money which C had collected at Calcutta, and the contents of a letter written by H giving an account of the conspiracy, are each relevant, both to prove the existence of the conspiracy, and to prove A's complicity in it, although he may have been ignorant of all of them, and although the persons by whom they were done were strangers to him, and although they may have taken place before he joined the conspiracy or after he left it.

When facts not otherwise relevant, become relevant.

11. Facts not otherwise relevant are relevant—

(1) if they are inconsistent with any fact in issue or relevant fact;

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(2) if by themselves or in connection with other facts they make the existence or non-existence of any fact in issue or relevant fact highly probable or improbable.

Illustrations.

(*a.*) The question is, whether A committed a crime at Calcutta on a certain day.

The fact that, on that day, A was at Lahore is relevant.

The fact that, near the time when the crime was committed, A was at a distance from the place where it was committed, which would render it highly improbable, though not impossible, that he committed it, is relevant.

(*b.*) The question is, whether A committed a crime.

The circumstances are such that the crime must have been committed either by A, B, C or D. Every fact which shows that the crime could have been committed by no one else, and that it was not committed by either B, C or D, is relevant.

Notes.

By a majority of the Full Bench of the High Court at Calcutta it was held that a former judgment, which is not a judgment *in rem* nor one relating to matters of a public nature, is not admissible in evidence in a subsequent suit either as a *res judicata* or as a proof of the particular point which it decides unless between the same parties or those claiming under them.

In a suit between A and B, the question was whether C or D was the heir of H. If C was the heir of H, then A was entitled to succeed ; otherwise not. The same question had been raised in a former suit brought by X against A and decided against A ; and this former judgment was admitted in evidence in the suit between A and B and dealt with by the Courts below as conclusive evidence against A upon the point so decided. *Held* that the former judgment was not admissible as evidence in the suit against B either as a "fact" under this section or as a "transaction" under Sec. 13 or under any other section of this Act. *Gujju Lall v. Fattch Lall* (I. L. R., 6 Cal., 171 ; 6 C. L. R., 439). In this case *Garth, C. J.*, (whose decision will be frequently referred to hereafter in the notes to sections 13, 40, 41, 42 and 43) *held* that the delivery or existence of the judgment itself may be a "fact," but the decision which the judgment contains is no more a fact than an opinion expressed by any other person, who is not exercising judicial functions.

See also the first case cited in the notes to Sec. 5 (ante p. 4).

This section should not be construed in its widest signification, but considered as limited in its effect by Sec. 54. So construed this section renders inadmissible the evidence of one crime (not reduced to legal certainty by a conviction) to prove the existence of another unconnected crime, even though it be cognate. Accordingly the possession by an accused person of a number of documents suspected to be forged is no evidence to prove that he has forged the particular document with the forgery of which he is charged. *Reg. v. Parbhudas Ambaram and others* (11 Bom H. C. Rep., 90).

See also the decision of *Mitter, J.*, in *Empress v. M. J. Vyapoora Moodiliar* (8 C. L. R., 197 ; I. L. R., 6 Cal., 655) quoted under s. 14 (post p. 13.)

In suits for damages, facts tending to enable Court to determine amount are relevant.

12. In suits in which damages are claimed, any fact which will enable the Court to determine the amount of damages which ought to be awarded is relevant.

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Facts relevant when right or custom is in question.

13. Where the question is as to the existence of any right or custom, the following facts are relevant—

(*a.*) Any transaction by which the right or custom in question was created, claimed, modified, recognized, asserted or denied, or which was inconsistent with its existence.

(*b.*) Particular instances in which the right or custom was claimed, recognised, or exercised or in which its exercise was disputed, asserted or departed from.

Illustrations.

The question is, whether A has a right to a fishery. A deed conferring the fishery on A's ancestors, a mortgage of the fishery by A's father, a subsequent grant of the fishery by A's father, irreconcileable with the mortgage, particular instances in which A's father exercised the right, or in which the exercise of the right was stopped by A's neighbours, are relevant facts.

Notes.

In the case of *Koondoonath Surma Gossamee v. Dheerchundra Surma Odhikaree Gossamee* (XX W. R., 345-7) it was held that in determining the right to the *Odhikaree* and the custom or rule of succession to the office, previous judgments or decrees involving instances in which the right or custom had been successfully asserted were admissible as evidence under this section.

In a suit to establish an *itmamee* right to certain lands plaintiff produced certain transcript decisions of the Civil Courts in suits, in which a former holder of the tenure under the person who was said to have created the right was a party; but the Lower Appellate Court rejected them as evidence on the ground that the defendant was not a party to the suits. It was held that the proceedings in such suits came within the meaning of "any transaction" in this section and were admissible as evidence in the case under Sec. 43, not as conclusive, but as of such weight as the Court might think they have. *Neamut Ali v. Gooroo Doss* (22 W. R., 365-7.)

A finding in a former suit, in which the question was tried between all the parties to the present suit, was held to be admissible as evidence in this suit under this section, although the plaintiffs and defendants were in form co-defendants in the former suit. *Guttee Koiburto v. Bhukut Koiburto and others* (22 W. R., 457.)

Where a suit was disposed of according to a compromise, of which the judgment, set out the terms in the form of a recital; *Held* that the judgment, though not in the ordinary form of a decree, was the record of a transaction by which the rights of the parties were recognised, and was therefore relevant as evidence under this section. *Rupchand Bhukut v. Hurkishen Doss* (23 W. R., 162).

A decision, to which plaintiff was not a party, though admissible as evidence, cannot be held to be conclusively binding on him. *Omerdutt Jha v. Colonel James Burn* (24 W. R., 470) see also *Duitari Mohanti and another v. Jugobundhoo Mohanti and others* (23 W. R., 293).

Judgments and decrees recognising rights between parties to a suit or between persons whom they represent, although they are not conclusive under this Act, as they were before the Act came into operation, are yet admissible in evidence under this section even if the parties in the former suit be entire strangers. Where the parties are the same or representatives of those in the former suit, such judgments and decrees may be evidence so nearly conclusive as, when produced by the parties in whose favor they are, to shift the burden of proof from him to his opponent. *Naranji Bhikha Bhai and others v. Dipa Umed and others* (I. L. R., 3 Bom., 3).

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Garth, C. J., in the case reported in I. L. R., 6 Cal., 171 and cited under Sec. 11 (ante p. 9) considered that the judgment in the former suit was not a "transaction" and that the right claimed in the suit then before him (which was a right to recover possession of certain property) was not a "right" within this section. A transaction in the ordinary sense of the word is some business or dealing which is carried on or transacted between two or more persons. If the parties to a suit were to adjust their differences *inter se*, the adjustment would be a transaction; and by a somewhat strained use of the word, the proceedings in a suit might also be called "transactions;" but to say that the decision of a Court of Justice is a transaction appeared to His Lordship a misapplication of the term.

His Lordship thought the word "right" was here intended to include those properties only of an incorporeal nature, which in legal phraseology are generally called "rights," more especially, as it is used in conjunction with the word "custom." It is certainly used in that sense in subsequent parts of this Act (see s. 48 and sub section 4 of s. 32), which deal with matters of public or general "right or custom," and in this section the word is probably intended to include both public or private rights of that nature. That the expression is used in this limited sense was shown also, as it seemed to him, by the words with which it is associated. The right mentioned in the section is one which can be "created or exercised," which expressions are perfectly appropriate when speaking of an incorporeal right, but would be wholly inapplicable to the word right in its more extended sense.

Under this section road cess papers and a deed of sale are evidence *quantum valeat*. *Duitari Mohanti and another v. Jugobundhoo Mohanti and others.* (23 W. R, 293).

The right mentioned in this section is not a public right only—*Soorjonarain Panda v. Bissumbhur Singh.* (23 W. R, 311).

A map prepared by an officer of Government while in charge of a khás mehál, Government being at the time in possession of the mehal merely as a private proprietor, is not a map purporting to have been made under the authority of Government the accuracy of which must be presumed under Sec. 83, but such a map may be admitted as evidence under this section. *Junmajoy Mullick v. Dwarkanath Mytee.* (I. L. R, 5 Cal., 287; 4 C. L. R., 574).

Facts showing existence of state of mind, or of body or bodily feeling.

14. Facts showing the existence of any state of mind—such as intention, knowledge, good faith, negligence, rashness, ill-will or good-will towards any particular person, or showing the existence of any state of body or bodily feeling—are relevant, when the existence of any state of mind or body or bodily feeling, is in issue or relevant.

Explanation.—A fact relevant as showing the existence of a relevant state of mind must show that the state of mind exists, not generally, but in reference to the particular matter in question.

Illustrations.

(*a.*) A is accused of receiving stolen goods knowing them to be stolen. It is proved that he was in possession of a particular stolen article.

The fact that, at the same time, he was in possession of many other stolen articles is relevant, as tending to show that he knew each and all of the articles of which he was in possession to be stolen.

(*b.*) A is accused of fraudulently delivering to another person a piece of counterfeit coin which, at the time when he delivered it, he knew to be counterfeit.

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The fact that, at the time of its delivery, A was possessed of a number of other pieces of counterfeit coin, is relevant.

(*c.*) A sues B for damage done by a dog of B's, which B knew to be ferocious.

The facts that the dog had previously bitten X, Y and Z, and that they had made complaints to B, are relevant.

(*d.*) The question is, whether A, the acceptor of a bill of exchange knew that the name of the payee was fictitious.

The fact that A had accepted other bills drawn in the same manner before they could have been transmitted to him by the payee if the payee had been a real person, is relevant, as showing that A knew that the payee was a fictitious person.

(*e.*) A is accused of defaming B by publishing an imputation intended to harm the reputation of B.

The fact of previous publications by A respecting B, showing ill-will on the part of A towards B, is relevant, as proving A's intention to harm B's reputation by the particular publication in question.

The facts that there was no previous quarrel between A and B, and that A repeated the matter complained of as he heard it, are relevant, as showing that A did not intend to harm the reputation of B.

(*f.*) A is sued by B for fraudulently representing to B that C was solvent, whereby B, being induced to trust C, who was insolvent, suffered loss.

The fact that, at the time when A represented C to be solvent, C was supposed to be solvent by his neighbours and by persons dealing with him, is relevant, as showing that A made the representation in good faith.

(*g.*) A is sued by B for the price of work done by B upon a house of which A is the owner, by the order of C, a contractor.

A's defence is that B's contract was with C.

The fact that A paid C for the work in question is relevant, as proving that A did, in good faith, make over to C the management of the work in question, so that C was in a position to contract with B on C's own account, and not as agent for A.

(*h.*) A is accused of the dishonest misappropriation of property which he has found, and the question is whether, when he appropriated it, he believed in good faith that the real owner could not be found.

The fact that public notice of the loss of the property had been given in the place where A was, is relevant, as showing that A did not in good faith believe that the real owner of the property could not be found.

The fact that A knew, or had reason to believe, that the notice was given fraudulently by C, who had heard of the loss of the property and wished to set up a false claim to it, is relevant, as showing that the fact that A knew of the notice did not disprove A's good faith.

(*i.*) A is charged with shooting at B with intent to kill him. In order to show A's intent, the fact of A's having previously shot at B may be proved.

(*j.*) A is charged with sending threatening letters to B. Threatening letters previously sent by A to B, may be proved as showing the intention of the letters.

(*k.*) The question is, whether A has been guilty of cruelty towards B, his wife.

Expressions of their feeling towards each other shortly before or after the alleged cruelty, are relevant facts.

The question is whether A's death was caused by poison.

Statements made by A during his illness as to his symptoms, are relevant facts.

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(*m.*) The question is, what was the state of A's health at the time when an assurance on his life was effected.

Statements made by A as to the state of his health at or near the time in question, are relevant facts.

(*n.*) A sues B for negligence in providing him with a carriage for hire not reasonably fit for use, whereby A was injured.

The fact that B's attention was drawn on other occasions to the defect of that particular carriage, is relevant.

The fact that B was habitually, negligent about the carriages which he let to hire, is irrelevant.

(*o.*) A is tried for the murder of B by intentionally shooting him dead.

The fact that A, on other occasions, shot at B is relevant, as showing his intention to shoot B.

The fact that A was in the habit of shooting at people with intent to murder them, is irrelevant.

(*p.*) A is tried for a crime.

The fact that he said something indicating an intention to commit that particular crime, is relevant.

The fact that he said something indicating a general disposition to commit crimes of that class is irrelevant.

Notes.

In a trial upon three specific charges of receiving illegal gratification from the firm of C & Co., at T in 1876 evidence of similar but unconnected instances of receiving illegal gratification from the same firm at T in the years 1877 & 1878 was offered.

Held that such evidence was inadmissible under ss. 5, 6, 8, 11 and 14—*Garth C. J.*, *held* that the latter section applied to that class of cases where a particular act is more or less criminal or culpable according to the state of mind or feeling of the person who does it;—as for instance, in actions of slander or false imprisonment or malicious prosecution, where malice is one of the main ingredients in the wrong which is charged, evidence is admissible to show that the defendant was actuated by spite or enmity against the plaintiff.

Mitter, J., *held* that the evidence offered was inadmissible under s. 6 because the payments of 1877 and 1878 were not connected with the facts in issue in this case so as to form part of the same transaction.....Nor was it admissible under s. 8 because it could not be said that they showed or constituted a motive or preparation for the fact in issue. Neither could the conduct of the accused as shewn in the alleged transactions of 1877, and 1878 be said to have been influenced by the facts in issue in the sense in which the words are used in that section..... ..... The influence referred to here must be direct and obvious; and in this sense he could not say that the transactions of 1877 and 1878 were in any way influenced by the facts in issue. The same observation would apply to the contention based upon s. 11. There also the words 'highly probable' point out that the connection between the fact in issue and the collateral facts sought to be proved must be so immediate as to render the existence of the two *highly* probable..... .... Under s. 14 collateral facts specified therein can be proved if the question be as to the existence of any state of mind. In this case if the receipt of the several sums of money mentioned in the charges be considered to have been proved to the satisfaction of the Court by other evidence, and if it be necessary to ascertain whether the accused *received* them as a *motive* for showing favour in the exercise of his official functions, the alleged transactions of 1877 and 1878 might in that case be relevant under this section. But they are not relevant for the purpose of establishing the *fact* of payment in the year 1876 *Empress v. M. J. Vyapoora Moodiliar* (8 C. L. R., 197; I. L. R., 6 Cal., 655.)

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Facts bearing on question whether act was accidental or intentional.

15. When there is a question whether an act was accidental or intentional or done with a particular intention, the fact that such act formed part of a series of similar occurrences, in each of which the person doing the act was concerned, is relevant.

Illustrations.

(*a.*) A is accused of burning down his house in order to obtain money for which it is insured.

The facts that A lived in several houses successively, each of which he insured, in each of which a fire occurred, and after each of which fires A received payment from a different insurance office, are relevant, as tending to show that the fires were not accidental.

(*b.*) A is employed to receive money from the debtors of B.

It is A's duty to make entries in a book showing the amounts received by him. He makes an entry showing that on a particular occasion he received less than he really did receive.

The question is, whether this false entry was accidental or intentional.

The facts that other entries made by A in the same book are false, and that the false entry is in each case in favour of A, are relevant.

(*c.*) A is accused of fraudulently delivering to B a counterfeit rupee.

The question is, whether the delivery of the rupee was accidental.

The facts that, soon before or soon after the delivery to B, A delivered counterfeit rupees to C, D and E are relevant, as showing that the delivery to B was not accidental.

Existence of course of business when relevant.

16. When there is a question whether a particular act was done, the existence of any course of business, according to which it naturally would have been done, is a relevant fact.

Illustrations.

(*a.*) The question is, whether a particular letter was despatched.

The facts that it was the ordinary course of business for all letters put in a certain place to be carried to the post, and that that particular letter was put in that place, are relevant.

(*b.*) The question is whether a particular letter reached A. The facts that it was posted in due course, and was not returned through the Dead Letter Office, are relevant.

ADMISSIONS.

Admission defined.

17. An admission is a statement, oral or documentary, which suggests any inference as to any fact in issue or relevant fact, and which is made by any of the persons, and under the circumstances, hereinafter mentioned.

Notes.

See the case *Regina v. Hanmanta and others* (I. L. R., 1 Bom, 610) cited under cl. 2 of s. 32 post.

Also *Soonun Bibee and another v. Ahmut Ali and others* cited under s. 33 post.

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Admission—by party to proceeding or his agent;

18. Statements made by a party to the proceeding, or by an agent to any such party, whom the Court regards, under the circumstances of the case, as expressly or impliedly authorized by him to make them, are admissions.

by suitor in representative character;

Statements made by parties to suits, suing or sued in a representative character, are not admissions, unless they were made while the party making them held that character.

Statements made by—

by party interested in subject matter;

(1.) persons who have any proprietary or pecuniary interest in the subject matter of the proceeding, and who make the statement in their character of persons so interested, or

by persons from whom interest derived.

(2) persons from whom the parties to the suit have derived their interest in the subject-matter of the suit, are admissions, if they are made during the continuance of the interest of the persons making the statements.

Notes.

A deposition made by defendant in a former suit may be used as an admission within the meaning of this section. *Hurish Chunder Mullick v. Prosunno Coomar Banerjea and others* (22 W. R., 303—5)

See also the case *Regina v. Hanmanta and others* (I. L. R., 1 Bom, 610) cited under s. 32, cl. 2.

Admissions by persons whose position must be proved as against party to suit.

19. Statements made by persons whose position or liability it is necessary to prove as against any party to the suit, are admissions, if such statements would be relevant as against such persons in relation to such position or liability in a suit brought by or against them, and if they are made whilst the person making them occupies such position or is subject to such liability.

Illustration.

A undertakes to collect rents for B.

B sues A for not collecting rent due from C to B.

A denies that rent was due from C to B.

A statement by C that he owed B rent is an admission, and is a relevant fact as against A, if A denies that C did owe rent to B.

Admissions by persons expressly referred to by party to suit.

20. Statements made by persons to whom a party to the suit has expressly referred for information in reference to matter in dispute are admissions.

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Illustration.

The question is, whether a horse sold by A to B is sound.

A says to B—'Go and ask C, C knows all about it.' C's statement is an admission.

Proof of admissions against persons making them, and by or on their behalf.

21. Admissions are relevant and may be proved as against the person who makes them, or his representative in interest; but they cannot be proved by or on behalf of the person who makes them or by his representative in interest, except in the following cases:—

(1.) An admission may be proved by or on behalf of the person making it, when it is of such a nature that, if the person making it were dead, it would be relevant as between third persons under section thirty-two.

(2.) An admission may be proved by or on behalf of the person making it, when it consists of a statement of the existence of any state of mind or body, relevant or in issue, made at or about the time when such state of mind or body existed, and is accompanied by conduct rendering its falsehood improbable.

(3.) An admission may be proved by or on behalf of the person making it, if it is relevant otherwise than as an admission.

Illustrations.

(*a.*) The question between A and B is, whether a certain deed is or is not forged. A affirms that it is genuine, B that it is forged.

A may prove a statement by B that the deed is genuine, and B may prove a statement by A that the deed is forged; but A cannot prove a statement by himself that the deed is genuine, nor can B prove a statement by himself that the deed is forged.

(*b.*) A, the Captain of a ship, is tried for casting her away.

Evidence is given to show that the ship was taken out of her proper course.

A produces a book kept by him in the ordinary course of his business, showing observations alleged to have been taken by him from day to day, and indicating that the ship was not taken out of her proper course. A may prove these statements, because they would be admissible between third parties, if he were dead, under section thirty-two, clause (two).

(*c.*) A is accused of a crime committed by him at Calcutta.

He produces a letter written by himself and dated at Lahore on that day, and bearing the Lahore post-mark of that day.

The statement in the date of the letter is admissible, because, if A were dead, it would be admissible under section thirty-two, clause (two).

(*d.*) A is accused of receiving stolen goods knowing them to be stolen.

He offers to prove that he refused to sell them below their value.

A may prove these statements, though they are admissions, because they are explanatory of conduct influenced by facts in issue.

(*e.*) A is accused of fraudulently having in his possession counterfeit coin which he knew to be counterfeit.

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He offers to prove that he asked a skilful person to examine the coin, as he doubted whether it was counterfeit or not, and that that person examined it and told him it was genuine.

A may prove these facts for the reasons stated in the last preceding illustration.

Notes.

The purchaser at a sale in execution of a decree was held to be "*representative in interest*" of the judgment debtor within this section *Unnopoorna Dossee v. Nuffur Poddar* (21 W. R., 148).

See also *Regina v. Hanmanta and others*, (I.L.R., I Bom., 610) cited under s.32, cl2.

An admission not being a confession of guilt, made by an accused person to a police officer before arrest is admissible in evidence—*Empress v. Dabeepershad* (7 C. L. R., 541; I. L. R., 6 Cal., 530.)

When oral admissions as to contents of documents are relevant.

22. Oral admissions as to the contents of a document are not relevant, unless and until the party proposing to prove them shows that he is entitled to give secondary evidence of the contents of such document under the rules hereinafter contained, or unless the genuineness of a document produced is in question.

Admissions in civil cases when relevant.

23. In civil cases no admission is relevant, if it is made either upon an express condition that evidence of it is not to be given, or under circumstances from which the Court can infer that the parties agreed together that evidence of it should not be given.

Explanation.—Nothing in this section shall be taken to exempt any barrister, pleader, attorney or vakil from giving evidence of any matter of which he may be compelled to give evidence under section one hundred and twenty-six.

Note.

That section refers to Privileged communications.

Confession caused by inducement, threat or promise when irrelevant in criminal proceeding.

24. A confession made by an accused person is irrelevant in a criminal proceeding, if the making of the confession appears to the Court to have been caused by any inducement, threat or promise, having reference to the charge against the accused person, proceeding from a person in authority and sufficient, in the opinion of the Court, to give the accused person grounds, which would appear to him reasonable, for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceeding against him.

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Notes.

In the case *Empress v. Ashgar Ali and others* (I. L. R., 2 All., 260) where a pardon was tendered by the Magistrate to a person supposed to have been concerned with other persons in offences none of which were exclusively triable by the Court of Session and such person was examined as witness in the case, it was *held* that the tender of pardon to such person not being warranted by s. 347 of Act X of 1872 he could not be legally examined on oath and his evidence was inadmissible, and it was also held that the statement made by such person was irrelevant and inadmissible as a confession with reference to s. 344 of Act X of 1872 and this section.

The provisions of s. 337 of Act X of 1882 take the place of those of s. 347 of the old Code and s. 313 is substituted for s. 344 of Act X of 1872. These provisions of the old and new Criminal Procedure Codes will be found placed in parallel columns in the notes to s. 30.

In *Reg. v. Bai Ratan* the Full Bench said that the words "duly made" in the latter clause of s. 346 probably meant made in such a manner as not to be rendered inadmissible by ss. 24, 25 or 26 of this Act or sections 119, 120 and 121 of Act X of 1872 and it was decided that the confession of an accused person, taken by a Magistrate having jurisdiction to commit or try him is imperfect, if not signed by the accused person or attested by his mark, and is inadmissible in evidence; and oral evidence to prove that a confession was made or what the terms of the confession were is inadmissible also (10 Bom. H. C. R., 166).

In the case of *Empress v. Bhairon Singh and others* (I. L R., 3 All., 338) the Magistrate recording the confessions of four prisoners disregarded the provisions of ss. 122 and 346; but *Pearson, J.*, held that it did not follow that the confessions made before Magistrates could not be taken into consideration merely because the memoranda required by the law to be attached thereto had not been written in the exact form prescribed. He saw no sufficient reason to believe that the confessions were "caused by any inducement, threat or promise, having reference to the charge against the accused persons, proceeding from a person in authority and sufficient to give the accused persons grounds which would appear to them to be reasonable for supposing, that, by making the same, they would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against them."

Sections 164 and 364 of Act X of 1882 are substituted for sections 122 and 346 of Act X of 1872 which will be found placed in parallel columns in the notes to s. 30.

In the absence of evidence that a confession of an accused person has been induced by illegal pressure, it is not to be presumed that such confession was so induced. This section renders a confession inadmissible only if the Court considers it to have been induced by illegal pressure. *Empress v. Balvant V. Pendharkar* (11 Bom. H. C. R., p. 137.)

In the *Reg. v. Rama Birapa* (I L. R., 3 Bom., 12—17) *West, J., held* that where more persons than one are jointly tried for the same offence, the confession made by one of them, if admissible in evidence at all, should be taken into consideration against all the accused and not against the person alone who made it. The Evidence Act intends to make those statements admissible and those only which are the complement of acts done or refused to be done, so that the act itself or the omission to act acquires a special significance as ground of inference with respect to the issues, in the case under trial. It is important that this should be borne in mind, as otherwise prisoners will, by the exercise of the commonest ingenuity, be entirely deprived of the safeguards which the Legislature intended to throw round them in sections 24 to 26 of this Act.

The direction of s, 346 of Act X of 1882 enjoining that an accused person shall sign the record of his confesson, is not satisfied by the following: "Signature of A B (the accused); the handwriting of C. D." Where the conviction of a person was based upon a confession thus subscribed, the High Court reversed it and *held* that the Sessions Judge was bound to prevent the production of such a confession. *Reg. v. Dayá Anand and Ranchod Khalpo.* (11 Bom. H. C. R., 44).

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A confession not taken in the form of question and answer and not authenticated by the Magistrate's endorsement as to its accuracy, is inadmissible in evidence even though no objection should be made to its reception—*Reg. v. Amrita* (10 Bom. H. C. R, 497).

In the case of of Titu Mya, (1 C L. R, 1) a Full Bench of the Calcutta High Court ruled that the omission of a Magistrate to have recorded in the vernacular the questions asked in the examination of the accused person does not necessarily render that examination inadmissible as evidence

A prisoner confessed his guilt before the Magistrate, who recorded the confession under s. 122 of Act X of 1872, but omitted to append to the record the proper certificate, or obtain the attestation of the accused by his signature or mark as required by s. 346. The prisoner was finally committed to the Sessions Court for trial. *Held* that the omissions could not be rectified under any authority contained in the last clause of section 346 by taking the evidence of the recording officer that the prisoner duly made the statement recorded, and that the confession was not admissible in evidence *Empress v. Munno Panioli* (4 C. L. R., 137; I. L. R., 4 Cal., 676).

S. 122 of Act X of 1872 does not apply to a confession recorded by a Magistrate acting under Cap. XV or Cap. XVII, but to a confession recorded by a Magistrate other than the Magistrate by whom the case has to be enquired into or tried; and to a confession made during or before the commencement of an investigation by the police. *In the matter of Behari Hadji* (5 C L R, 238).

Two accused persons, on being arrested were forwarded in custody to a Magistrate who had jurisdiction in the matter with which they were charged, and who afterwards conducted the preliminary enquiry, and committed them to the Court Sessions Before the Magistrate each made a confession but neither of them attested his confession by his signature or mark. *Held* that the confessions, although the Magistrate had noted that they were taken under s. 122 of Act X of 1872, must be regarded as having been taken in the course of a preliminary enquiry, and that the provisions of s. 346 allowing the evidence of the committing Magistrate to be taken, applied—*Per Curiam* s. 122 contemplates and provides for cases in which confessions are recorded by a Magistrate other than the Magistrate by whom the case is to be enquired into or tried. *Empress v Anauthram Singh and others* (6. C L R, 297; I L R, 5 Cal, 954)

The matter before a "panchayat" was whether M and K had murdered B and thereby disqualified themselves from further intercourse with the rest of their brotherhood. M and K made certain statements before the *panchayat*, which it was afterwards sought to prove against them on their trial for the murder of B as confessions corroborating the evidence of an approver. The witnesses called to prove these "confessions" did not state specifically what was said by M and K before the *panchayat*. One witness, a member of the *panchayat*, said. "M confessed, and K acquiesced." Another witness, also a member of the *panchayat*, said; "M and K were taxed with taking B's house, upon which both admitted having murdered him." The same witness also said "The admissions were not taken down." It appeared that it was not till at the sixth meeting of the *panchayat*, and M and K were threatened with excommunication from caste for life, that they made such statements, *Held* that, if the statements attributed to M and K had been actually made, and assented to, and this fact had been duly proved, the provisions of this section could not be pleaded against their admissibility on the ground that such statements had been caused by such threat, for the members of the *panchayat* were not in authority over M and K within the meaning of this section nor was there any threat made having reference to any charge against them. The statements, however, could not be accepted as sufficient in themselves to corroborate the evidence of the approver, or to support the conviction of M and K for the murder of B. The statements were in general terms and represented only the impression conveyed, by what might have been said, to the mind of the witnesses It was always essential that the Court should know as nearly as possible what were the words used by the supposed confessors, and what were the questions or matters in regard to which they were

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said. It might have been that the words ascribed to M and K taken with the questions put and the exact subject matter of the inquiry did not amount to a confession of the guilt believed by the hearers to have been confessed. *Empress v. Mohan Lall and others.* (I. L. R., 4 All., 46).

See also the case *Empress v. Pancham* quoted under s. 27 post.

Confession to Police Officer not to be proved.

25. No confession made to a Police officer, shall be proved as against a person accused of any offence.

Notes.

This section applies to confessions made to the higher officers of Police viz. the Commissioner and Deputy Commissioner of Police in Calcutta. The Chief Justice also held that the next section should not be read so as to qualify the plain meaning of this section. *Queen v. Hurrybole Ghose* (25 W. R., Cr., 36 ; I. L. R., 1 Cal., 207).

In *Imperatrix v. Pitamber Jina* (I. L. R., 2 Bom., 61) *Westropp, C. J., held* that this section did not preclude the counsel for one accused person, on behalf of his client, asking questions to prove a confession made by another accused person. But, under such circumstances, it would be the duty of the Judge to instruct the Jury that such confession is not to be received or treated as evidence against the person making it, but simply as evidence to be considered on behalf of the other. He also thought that unless the law were so, the accused person who was on his trial with the confessing party might be considerably prejudiced by the exclusion of that evidence.

See also the case of *Empress v. Rama Birapa* (I. L. R., 3 Bom., 12-17) cited under s. 24 (ante p. 18.).

Under this section, a confession made to a Police Officer is inadmissible in evidence, except so far as is provided by s. 27. It is immaterial whether such Police Officer be the officer investigating the case—the fact that such person is a Police Officer invalidates a confession. *In the matter of Hiran Miya alias Abdul Wahid* (1 C. L. R, 21).

A statement made to a police officer by an accused person while in the custody of the police, although intended to be made in self-exculpation and not as confession, may be nevertheless an admission of a criminating circumstance, and, if so under this and the next section it cannot be proved against the accused. *Imperatrix v. Pandharinath* (I. L. R., 6 Bom., 34.)

See also the case *Empress v. Dabeepershad* (7 C. L. R., 541 ; I. L. R., 6 Cal., 530) quoted under sec. 21 (ante p. 17).

See also the case *Empress v. Pancham* cited under Sec. 27 (post p. 21).

Confession by accused while in custody of police not to be proved against him.

26. No confession made by any person whilst he is in the custody of a Police officer, unless it be made in the immediate presence of a Magistrate, shall be proved as against such person.

Explanation * *Notes.* Added by Act III of

This section must not be read as qualifying the preceding section. *Queen v. Hurrybole Ghose* (25 W. R., Cr., 36 ; I. L R., 1 Cal., 207).

In *Empress v. Ram Churn Ghung and others* (24 W. R., Cr., 36). *Jackson J.*, said "It can hardly have been the intention of the Legislature that, when a fact is discovered in consequence of information received from one of several persons charged with an offence, and, when others give like information, that the fact should be treated as discovered from the information of them all. It should be deposed that a particular fact has been discovered from the information of A. B. and this will let in under s. 27 only so much as *relates distinctly to the fact thereby*

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discovered." See also the case *Empress v. Rama Birapa* (I. L. R., 3 Bom., 12-17) cited under s. 24 (ante p. 18).

A village Munsif in the Madras Presidency is a "Magistrate" within the meaning of this section. *Empress v. Ramanjiya* (I. L. R., 2 Mad., 5).

See also the case *Imperatrix v. Pandharinath* cited under the last section.

See also the case *Empress v Dabeepershad* (7 C. L. R., 541 ; I. L. R., 6 Cal., 530) quoted under sec. (21 ante p. 17).

See also the case *Empress v. Pancham* abstracted in the note to sec. 27 post.

How much of information received from accused may be proved.

27. Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a Police Officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered may be proved.

Notes.

See the case *Empress v. Ram Churn Chung* and others quoted under sec. 26 (ante p. 20) and reported in 24 W. R., Cr., 36.

Sec. 162 of Act X of 1882 provides that nothing in it shall be deemed to affect the provisions of this section.

Under this section not every statement made by a person accused of an offence while in the custody of a Police officer connected with the production or finding of property, is admissible. Those statements only which lead immediately to the discovery of property, and, in so far as they do lead to such discovery, are properly admissible. Whatever be the nature of the fact discovered, that fact must, in all cases, be itself relevant to the case, and the connection between it and the statements made must have been such that that statement constitutes the information through which the discovery was made, in order to render the statement admissible. Other statements connected with the one thus made evidence, and thus mediately but not necessarily or directly connected with the fact discovered are not admissible. *Reg. v. Jora Hasji, Bhaiji Rupsang and Bhogha Pira* (11 Bom., H. C. R, 242).

P, accused of the murder of a girl, gave to a Police officer a knife, saying it was the weapon with which he had committed the murder. He also said that he had thrown down the girl's anklets at the scene of the murder and would point them out. On the following day he accompanied the Police officer to the place where the girl's body had been found, and pointed out the anklets.

Held that such statements, being confessions made to a Police officer, whereby no fact was discovered, could not be proved against P. *Stuart, C. J., held* that the deposition of the head constable, although not legal evidence of any confession, was admissible as evidence of all the other circumstances referred to in it, which were that on the 2nd October he made a statement to the darogha and gave up a certain knife which he took out of his waistbelt: that he had thrown down the anklets at the scene of the murder; as it was late at the time he said he would point them out in the morning; that soon after sunrise on the following morning the accused repeated his statement and conducted the witness and sub-inspector and many other people to the juar field where the witness had found the body and there at 8 or 10 paces to the south of the place where it had been, and after slight (search), produced from under the leaves, which were strewed about, the anklets. And so in like manner His Lordship held the evidence to the same facts of Rameshar Dayal (a Policeman) and of Nadir Ali (a villager) except as proving a confession of the murder to be admissible and relevant, not only under Sec 27 but also under Sec. 28, which expressly forms an exception to the law provided by Sec. 24..... After referring to the two Bombay decisions (already mentioned in the notes),

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Reg. v. Jora Hasji and *Empress v. Rama Birapa*, His Lordship added, "Nothing can be more unreasonable, and I may add unjust, than the hard and fast line that is often attempted to be drawn in this country. Sec. 25 no doubt provides that "No confession made to a police officer shall be proved against a person accused of any offence." Now if this is meant to apply to all statements however voluntarily made to a Police officer, nothing could be more impolitic or obstructive, and I trust that this provision is not to be understood in any absolute sense and under all circumstances whatever. It ought to be read and understood in connection with the other sections which follow it particularly s. 28 for taken by itself and applied indiscriminately it is simply irrational and absurd.....I have no doubt in my own mind that statements by Police Officers embodying and including what may be understood as a confession or admission of guilt by an accused person are not wholly inadmissible, but may be received and applied so far as they prove merely corroborative circumstances and not an absolute confession." *Straight, J.*, remarked that in his opinion, those statements (referred to in the depositions of the head constable, constable and villager with regard to the knife and anklets) amounted to confessions, that they were made to the police ; that no fact was discovered in consequence of any information derived from such statements within the meaning of the proviso contained in s. 27.....In short it was by the *act* (of the accused) and not from any *Information* given by him that the anklets were discovered. It seemed to him that the obvious intention of the Legislature in passing the provisions contained in ss 25 and 26 was to deter the Police from extorting confessions, by rendering such confessions absolutely inadmissible in proof, unless made in the immediate presence of a Magistrate. It is manifest that the prohibition laid down in these two sections must be strictly applied, and any relaxation of it in accordance with the proviso to s. 27 should be sparingly admitted, and only to the extent of so much of the accused's statement as directly and distinctly relates to the fact alleged to have been discovered in consequence of it. *Empress v. Pancham* (I. L. R., 4 All., 198).

The editor submits that of the two opinions above abstracted the one held by Straight, J., interprets the more correctly the intentions of the Legislature ; and probably the learned Chief Justice will find that the majority of judicial decisions are in favour of his colleague's view.

Confession made after removal of impression caused by inducement, threat or promise, relevant.

28. If such a confession as is referred to in section twenty-four is made after the impression caused by such inducement, threat or promise has, in the opinion of the Court, been fully removed, it is relevant.

Note.

See the case of *Empress v. Pancham* referred to in the notes to s. 27.

Confession otherwise relevant not to become irrelevant because of promise of secrecy, &c.

29. If such a confession is otherwise relevant, it does not become irrelevant merely because it was made under a promise of secrecy, or in consequence of a deception practised on the accused person for the purpose of obtaining it, or when he was drunk or because it was made in answer to questions which he need not have answered, whatever may have been the form of those questions, or because he was not warned that he was not bound to make such confession, and that evidence of it might be given against him.

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30. When more persons than one are being tried jointly for the same offence, and a confession made by one of such persons affecting himself and some other of such persons is proved, the Court may take into consideration such confession as against such other person as well as against the person who makes such confession.

Consideration of proved confession affecting person making it and others jointly under trial for same offence.

Illustrations.

(*a.*) A and B are jointly tried for the murder of C. It is proved that A. said,——'B and I murdered C.' The Court may consider the effect of this confession as against B.

(*b.*) A is on his trial for the murder of C. There is evidence to show that C was murdered by A and B, and that B said,——'A and I murdered C.

This statement may not be taken into consideration by the Court against A, as B is not being jointly tried.

Notes.

The corroboration, which is needed in order to make the testimony of an approver witness trustworthy, should be corroboration derived from evidence which is independent of accomplices and not vitiated by the accomplice character of the witness and further should be such as to support that portion of the accomplice's testimony, which makes out that the prisoner was present at the time when the crime was committed and participated in the act of commission. The statement must not be merely *generally true* but true in the *particular* points which affect the persons accused. Under this section the statement of fact made by a prisoner, which amounts to a confession of guilt on his part, may be taken into consideration *so far and so far only as that particular statement of fact itself extends against the other prisoners who are being tried, as well as himself for the offence which is thus confessed. Queen v. Mohesh Biswas and others* (19. W. R., Cr., 19).

The confessions of persons tried jointly for the same offence may by this section, be "considered" as against other parties then on their trial with them, but such confessions when used as evidence as against others, stand in need of corroboration and cannot be used as corroborating in any way the evidence of approvers against such other parties. This section ought to be construed with great strictness and the confession of one person is not admissible against another although the two are jointly tried if one is tried for the abetment of the offence for which the other is on his trial. *Queen v. Jaffir Ali and others* (19 W. R., Cr., 57).

In *Queen v. Belat Ali Moonshee and others* (19 W. R., Cr., 67), it was *held* that before the confession of a person, jointly tried with the prisoner, could be taken into consideration against such prisoner it must appear that that confession implicated the confessing person substantially to the same extent as it implicated the person against whom it is to be used, in the commission of the offence for which the prisoners are being jointly tried.

Where the only evidence for the prosecution was that of witnesses whom the Judicial Commissioner considered unworthy of belief, it was *held* that the prisoners, who were charged with rioting ought not to have been convicted on the statements of the opposite party who were also charged with rioting, such statements not being evidence against the accused in this case. *Queen v. Khukrec Ooram and others* (21 W. R., Cr., 48).

Statements made by one set of prisoners criminating another set of prisoners when each individual prisoner made a case for himself on which he was free from any criminal offence, ought not to be taken into consideration under this section against the prisoners of the second set, when the two sets, although tried together, were tried upon totally different charges. *Queen v. Bunwaree Lall and others* (21 W. R., Cr., 53).

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In *Queen v. Naga and others* (23 W. R, Cr., 24). *Phear, J.*, said "This Court has already had occasion in more than one case to point out that confessions which are made use of under this section, in the first place can only be so used, so far as they make the confessing prisoner guilty of the offence for which all are being tried, and, secondly, cannot stand higher than the evidence of an accomplice. It has also been explained in what respect an accomplice's testimony required to be corroborated before even that can be rightly relied upon against the accused persons. And it is obvious that the confessions of co-prisoners are characterised by a very serious infirmity as regards the prisoners against whom they were [illegible] to be used under this section. In addition to the infirmity inherent in an accomplice's testimony, they are neither sanctioned by an oath, nor can they be tested, developed or explained by cross-examination. And when we look at the words of the section itself, we find the Legislature avoids saying that confessions of this sort are *evidence*, or may be used as evidence as against persons other than those who made them, it says merely the Court may *take into consideration* such confession as against such other persons as well as against the person who makes such confession. It is, we conceive, generally unsafe to use materials of this character against persons under trial without carefully bearing in mind its special infirmity of character."

In *Queen v. Chunder Bhuttacharjee* (24 W. R., Cr., 42) *Jackson, J.*, said, "This section provides that, when more persons than one are being tried jointly for the same offence (dacoity in this case), and a confession made by one of such persons affecting himself and some other of such persons is proved, the Court may take into consideration such confession as against such other person as well as against the person who makes such confession.....The section does not provide, as has been repeatedly pointed out by this Court, that such confession is evidence, still less does it say that it shall be the foundation of a case against the person implicated. The Legislature very guardedly says that it may be "taken into consideration," and I think the obvious intention of the Legislature in so saying was that when, as against any such person, there is evidence tending to his conviction, the truth or completeness of this evidence being the matter in question, the circumstance of such person being implicated by the confession of one of those who are being jointly tried with him, should be taken into consideration as bearing upon the truth or sufficiency of such evidence..... This section requires that a confession made by one prisoner which is to be used for the purpose of affecting another, must be *proved*. Now, when a confession has to be used for that purpose, the person to be affected by it has a right to demand that it be strictly proved and shown to have been in all essential respects taken and recorded as prescribed by law." (In the manner laid down in sections 122, 345 and 346 of Act 10 of 1872).

The latter clause of Sec. 346 was held, in the same case, to apply only to an examination taken in the course of a preliminary enquiry.

The reception as evidence against an accused person of a confession, which ought not to have been proved and which is not in accordance with the law, and the grounding of a case against him upon such confession, must be held to be irregularities which seriously prejudice the prisoner.

Section 164 of Act X of 1882 has replaced s. 122 of Act X of 1872, and sections 342 and 364 have respectively replaced sections 345 and 346 of Act X of 1872. It is significant that there is no clause in Act X of 1882, which corresponds with the latter clause of s. 346 of Act 10 of 1872.

Statements made by a prisoner before the committing officer, which implicate his fellows but exculpate himself, cannot be regarded as evidence under this section *Queen v. Keshub Bhoonia and others.* (25 W. R., Cr., 8).

Tainted evidence is not improved by being corroborated by other tainted evidence. The statement of one prisoner cannot be taken as evidence against another prisoner under this section, unless the confessing prisoner implicates himself to the full as much as his co-prisoner whom he incriminates. The rules of evidence cannot be departed from because there may be a strong moral conviction of guilt. *Queen v. Baijoo Chowdhree and others* (25 W. R., Cr., 43).

Under this section, the confession of a prisoner affecting himself and another

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person charged with the same offence is, when duly proved, admissible as evidence against both, but such second person cannot, when it is uncorroborated as against him, be legally convicted on it. This was a Full Bench decision ; and the Full Bench also ruled that the word "Court" in this section, means not only the Judge in a trial by a Judge with a Jury, but includes both Judge and Jury. *Garth, C. J., held* that such evidence must be dealt with by the Court in the same manner as any other evidence. The weight, however, to be attached to such evidence, and the question whether taken by itself it is sufficient, in point of law, to justify a conviction, is a question for the Judge. Unsupported by other evidence, it, however, should be taken as evidence of the very weakest kind, being simply a statement of a third person not made upon oath or affirmation. If such confession is corroborated by other evidence, it is immaterial whether, in proving the case at the trial the confession precedes the other evidence, or the other evidence precedes the confession, *Jackson, J.*, (*McDonell, J.*, concurring) *held* such evidence is not sufficient to support a conviction, even if corroborated by circumstantial evidence, unless the circumstances constituting corroboration would, if believed to exist, themselves support a conviction. *Empress v. Aushootosh Chuckerbutty and others* (F. B., I. L. R., 4 Cal., 483 ; 3 C. L. R., 270).

A prisoner, charged together with others, with being a member of an unlawful assembly, made a statement before the committing Magistrate implicating his fellow prisoners and another person. He subsequently withdrew his statement and made another, in which he endeavoured to exculpate himself. *Held*, that this statement was not evidence against the other prisoners under this section—it was not a confession, nor did it amount to any admission by the prisoner that he was guilty in any degree of the offence charged ; but it was simply an endeavour on his part to explain his own presence on the occasion in such a manner as to exculpate himself, and any mention made by him in such a statement of other persons having been engaged in the riot, was altogether irrelevant and not evidence against them. *Noor Bux Kazi and others v. Empress* (I.L.R., 6 Cal., 279).

Several persons were charged together with offences under ss. 148, 302, 324, and 326, read with s. 149, of the Penal Code. The Sessions Judge, when about to examine the prisoners, required all but the prisoner under examination to withdraw from the Court, until his turn for examination came round, and convicted each prisoner chiefly upon what was said by his coprisoners during his absence from the Court. *Held* that the evidence was inadmissible *Empress v. Chandra Nath Sirkar and others* (I. L. R., 7 Cal., 65, 8 C. L. R., 352).

This decision has been followed by the Bombay High Court in the case *Empress v. Lakshman Bala and Bala Ramseth* (I. L. R., 6 Bom., 124). The facts of this case were very similar to the facts of the case tried by the Calcutta High Court.

If the certificate required by s. 122 of Act X of 1872 that a confession is voluntary is not recorded by the Magistrate at the time the confession is made, or, at any rate, on the day it is reduced to writing, the confession is bad and inadmissible in evidence.

To render the statement of one person jointly tried with another for the same offence liable to consideration against that other, it is necessary that it should amount to a distinct confession of the offence charged *Empress v. Daji Narsu and Govinda Natha* (I. L. R., 6 Bom., 288.)

In *Reg. v. Ambigara Hulagu and another* (I, L. R. 1 Mad. 163,) it was *held* that a conviction based solely on the evidence of a co-prisoner is bad in law.

In *Empress v. Bhawani and another* (I. L. R., 1 All., 664) it was *held* that the conviction of a person who is being tried together with other persons for the same offence cannot proceed merely on an uncorroborated statement in the confession of one of such other persons. This case was followed in the case of *Empress v. Ramchand* (I. L. R., 1 All., 675.)

Where the confession of a person being tried jointly with other persons did not implicate him to the same extent as it implicated such other persons and was not sufficient of itself to justify his conviction, it was *held* that such confession could not be taken into consideration under this section. The case of *Queen v. Belat Ali*

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(quoted Supra p. 23), followed. *Empress v. Ganraj and others* (I. L. R., 2 All., 444.)

Held, where a person, being tried jointly with other persons, made a statement deprecating any guilty knowledge and seeking to clear himself at the expense of such other persons, that such statement could not be taken into consideration against such other persons. *Empress vs. Mulu.* (I. L. R., 2 All., 646.)

The confession of a person, who says he abetted a murder but withdrew before the perpetration of that murder by his associates, cannot be used against those associates though the person confessing is tried with them jointly on a charge of murder, *Reg. v. Amrita.* (10 Bom. H.C.R., 497.)

A prisoner who pleads guilty at the trial, and is thereupon convicted and sentenced, cannot be said to be jointly tried with the other prisoners, committed on the same charge, who plead not guilty. Where, therefore, one of eight prisoners before the committing Magistrate made a confession affecting himself and five others and afterwards at the trial before the Assistant Sessions Judge, pleaded guilty and was thereupon convicted and sentenced, and the Judge then proceeded to take his evidence on solemn affirmation and recorded his confession as evidence in the case against the other prisoners. *Held* the Judge was wrong in taking the confession into consideration against those prisoners who pleaded not guilty. The proper course for the Judge was either to have sentenced the prisoner who pleaded guilty, and then put him aside, or to have waited to see what the evidence would disclose. *Reg. v. Kalu Patel and another* (11 Bom H. C. R., 146).

The evidence requisite for corroboration of an accomplice must proceed from an independent and reliable source; previous statements made by the accomplice himself though consistent with the evidence given by him at the trial, are insufficient for such corroboration. The confession of one of the prisoners cannot be used to corroborate the evidence of an accomplice against the others. *Reg. v. Malapa bin Kapana and others* (11 Bom H. C. R., 196).

A and B were committed for trial; the former for dacoity under s, 395 of the Indian Penal Code and the latter under s. 412 for receiving stolen property knowing it to be such. A made two confessions, and in both he stated he had handed over to B some pieces of gold and silver stolen at the dacoity. When B was arrested a gold ring and silver wristlet were found in his possession. At the trial A pleaded guilty and B claimed to be tried. A goldsmith deposed that he had made the ring and wristlet found with B out of the pieces of gold and silver given to him for the purpose by B. On this evidence and on the confessions made by A the Sessions Judge convicted B. The Bombay High Court *held*, on appeal, that A and B not having been tried jointly for the same offence, the confession of A was inadmissible as evidence against B. That there was therefore no evidence of the identity of the goods stolen at the dacoity with those found in B's possession, and the case against him failed. Conviction quashed. *Empress. v. Bala Patel* (I. L. R., 5. Bom., 63).

The present will be a convenient opportunity to draw attention to the provisions contained in the Criminal Procedure Code relating to confessions, the examination of accused persons and the tender of pardon to such. To facilitate comparison, the provisions of the moribund Code Act X of 1872 will be placed side by side with the provisions of the new Code which will shortly replace them.

ACT X OF 1872.	*ACT X. OF* 1882.
122. No Police Officer or other person shall offer any inducement to an accused person by threat or promise or otherwise to make any disclosure or confession, whether such person be under arrest or not. But no Police Officer or other person shall prevent the person	163 No Police Officer or person in authority shall offer or make, or cause to be offered or made, any such inducement threat or promise as is mentioned in the Indian Evidence Act. 1872 S. 24. But no Police Officer or other person shall prevent, by any caution or otherwise, any person from

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arrested, by any caution or otherwise, from making any disclosure which he may be disposed to make of his own free will.

119. An officer in charge of a Police station or other Police officer making an investigation, may examine orally any person supposed to be acquainted with the facts and circumstances of the case, and may reduce into writing any statement made by the persons so examined. Such person shall be bound to answer all questions relating to such case put him by such officer other than questions criminating himself.

No statement so reduced into writing shall be signed by the persons making it, nor shall it be treated as part of the record or used as evidence.

121. No police officer shall record any admission or confession of guilt which may be made before him by a person accused of any offence.

Provided that nothing in this section shall preclude a Police officer from reducing any such statement or admission or confession into writing for his own information or guidance or from giving evidence of any dying declaration.

122. Any Magistrate may record any statement made to him by any person, or any confession made to him by any person accused of an offence by any Police Officer or other person. Such statements shall be recorded in the manner provided in sections 345 and 346 and shall when recorded be forwarded to the Magistrate by whom the case is enquired into or tried. No Magistrate shall record any such confession unless, upon inquiry, he has reason to believe that it was made voluntarily and he shall make a memorandum at the foot of any such confession to the following effect :—

making in the course of any investigation under this chapter (XIV) any statement which he may be disposed to make of his own free-will.

161. Any Police officer making an investigation under this chapter (XIV). may examine orally any person supposed to be acquainted with the facts and circumstances of the case and may reduce into writing any statement made by the person so examined.

Such person shall be bound to answer *truly* all questions relating to such case put to him by such officer, other than questions the answers to which would have a tendency to expose him to a criminal charge or to a penalty or forfeiture.

162. No statement, other than a dying declaration, made by any person to a Police officer in the course of an investigation under this chapter (XIV). shall, if reduced to writing be signed by the person making it or be used as evidence against the accused.

Nothing in this section shall be deemed to affect the provisions of section 27 of the Evidence Act 1872, section 24.

164 Any Magistrate, not being a Police Officer, may record any statement or confession made to him in the course of an investigation under this chapter (XIV). or at any time afterwards before the commencement of the inquiry or trial.

Such statement shall be recorded in such of the manners hereafter prescribed for recording evidence as is in his opinion best fitted for the circumstances of the case.

Such confessions shall be recorded and signed in the manner provided in section 364 and shall then be forwarded to the Magistrate by whom the case is to be inquired into or tried.

No Magistrate shall record any such

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"I believe that this confession was voluntarily made"

(Sd.) A. B.,
Magistrate.

confession unless, upon questioning the person making it, he has reason to believe that it was made voluntarily; and when he records any confession he shall make a memorandum at the foot of such record to the following effect.

"I believe that this confession was voluntarily made. It was taken in my presence and hearing, and was read over to the person making it and admitted by him to be correct and it contains a full and true account of the statement made by him".

(Sd.) A. B.,
Magistrate.

342. In all inquiries and trials a criminal Court may from time to time and at any stage of the proceedings, put any questions to the accused person which the Court may think proper.

Note.

Similar provisions are also contained in s.s. 193 and 250 but this is a general provision which applies to all inquiries and trials.

342. For the purpose of enabling the accused to explain any circumstances appearing in the evidence against him, the Court may at any stage of any inquiry or trial, without previously warning the accused, put such questions to him as the Court considers necessary, and shall, for the purpose aforesaid, question him generally on the case after the witnesses for the prosecution have been examined and before he is called on for his defence.

343. The accused person shall not be liable to any punishment for refusing to answer or for answering falsely questions asked under s. 342 but the Court shall draw such inference as seems just from such refusal.

Note.

See Sec. 114 ill. (h) post and the explanation given by this Act of that illustration.

The accused shall not render himself liable to punishment by refusing to answer such questions, or by giving false answers to them; But the Court and the jury (if any) may draw such inference from such refusal or answers as it thinks just.

193. *Explanation.* The answer given by an accused person may be put in evidence against him, not only in the case under inquiry, but also in trials for any other offences which his replies may tend to show he has committed.

The answers given by the accused may be taken into consideration in such inquiry or trial, and put in evidence for or against him in any other inquiry into, or trial for any other offence which such answers may tend to show he has committed.

345. No oath or affirmation shall be administered to the accused person.

No oath shall be administered to the accused.

344. Except as is provided in s. 347 no influence, by means of any

343 Except as provided in sections 337 and 338, no influence, by means

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promise or threat or otherwise shall be used to the accused person to induce him to disclose or withhold any matter within his knowledge.

346. Whenever an accused person is examined the whole of such examination, including every question put to him and every answer given by him, shall be recorded in full, and shall be shown or read to him and he shall be at liberty to explain or add to his answers.

When the whole is made conformable to what he declares to be the truth, the examination shall be attested by the signature of the Magistrate or Sessions Judge, who shall certify under his own hand that it was taken in his presence and in his hearing and contains accurately the whole of the statement made by the accused person.

In cases in which the examination of the accused person is not recorded by the Magistrate or Sessions Judge, he shall be bound, as the examination proceeds, to make a memorandum thereof in the vernacular of the District, or in English, if he is sufficiently acquainted with that language; and such memorandum shall be written and signed by the Magistrate or Sessions Judge with his own hand and shall be annexed to the record. If the Magistrate or Sessions Judge is precluded from making a memorandum as above required, he shall record the reason of his inability to do so.

The accused person shall sign or

of any promise or threat or otherwise shall be used to an accused person to induce him to disclose or withhold any matter within his knowledge.

364. Whenever the accused is examined by any Magistrate, or by any Court other than a High Court established by Royal charter or the Chief Court of the Panjab, the whole of such examination, including every question put to him and every answer given by him shall be recorded in full, in the language in which he is examined, or, if that is not practicable, in the language of the Court or English and such record shall be shown or read to him or, if he does not understand the language in which it is written, shall be interpreted to him in a language which he understands, and he shall be at liberty to explain or add to his answers.

When the whole is made conformable to what he declares is the truth, the record shall be signed by the accused and the Magistrate or Judge of such Court, and such Magistrate or Judge shall certify under his own hand that the examination was taken in his presence and hearing, and that the record contains a full and true account of the statement made by the accused.

In the cases in which the examination of the accused is not recorded by the Magistrate or Judge himself, he shall be bound unless he is a Presidency Magistrate, as the examination proceeds, to make a memorandum thereof in the language of the Court, or in English, if he is sufficiently acquainted with the latter language; and such memorandum shall be written and signed by the Magistrate or Judge with his own hand, and shall be annexed to the record. If the Magistrate or Judge is unable to make a memorandum as above required, he shall record the reason of such inability. Nothing in this section shall be deemed to apply to the examination of an accused per-

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attest by his mark such record.

If the examination be taken in the course of a preliminary enquiry, and the Court of Session find that the provisions of this section have not been fully complied with, it shall take evidence that the prisoner duly made the statement recorded; Provided that, if the error does not prejudice the prisoner, it shall not be deemed to affect the admissibility of the statement so recorded.

Note.—There does not seem to be any provision in Act X of 1882 corresponding with the latter paragraph of this section.

347 The Magistrate of the District, any Magistrate of the first class, inquiring into the case, or with the sanction of the Magistrate of the District, any Magistrate duly empowered to commit to the Court of Session may, after recording his reason for so doing tender a pardon to any one or more of the persons supposed to have been directly or indirectly concerned in or privy to any offence specified in column seven of the fourth schedule hereto annexed as triable exclusively by the Court of Session, on condition of his or their making a full true and fair disclosure of the whole of the circumstances within his or their knowledge, relative to the crime committed and every other person concerned in the perpetration thereof.

Any person accepting a tender of pardon under this section shall be examined as a witness in the case under the rules applicable to the examination of witnesses.

Such person, if not on bail, shall be detained in custody pending the termination of the trial.

A Magistrate, having tendered a pardon under this section and examined the accused person, is precluded from trying the case himself.

son under section 263.

Note.—Section 263 relates to summary trials.

337. In the case of any offence triable exclusively by the Court of Session or High Court, the District Magistrate, a Presidency Magistrate, any Magistrate of the first class inquiring into the offence, or, with the sanction of the District Magistrate, any other Magistrate, may, with the view of obtaining the evidence of any person supposed to have been directly or indirectly concerned in, or privy to, the offence under inquiry, tender a pardon to such person on condition of his making a full and true disclosure of the whole of the circumstances within his knowledge relative to such offence and to every other person concerned whether as principal or abettor, in the commission thereof.

Every person accepting a tender of pardon under this section shall be examined as a witness in the case.

Such person, if not on bail, shall be detained in custody until the termination of the trial by the Court of Session or High Court as the case may be.

Every Magistrate, other than a Presidency Magistrate, who tenders a pardon under this section shall record his reasons for so doing; and when any Magistrate has made such tender, and exa-

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mined the person to whom it has been made, he shall not try the case himself, although the offence which the accused appears to have committed may be triable by such Magistrate.

Note.

The object of the last sixteen words is by no means clear. The *only* cases in which pardon can be tendered are those triable exclusively by the Court of Session and therefore the Magistrate could not lawfully try such a case how then can the offence, which the accused appears to have committed, be triable by the Magistrate ?

348. The High Court as a Court of Revision, and the Court of Session, after committal but before the commencement of a trial, may, with the view of obtaining on the trial the evidence of any person or persons supposed to have been concerned in, or privy to, any such offence instruct the committing Magistrate to tender a pardon on the same condition to such person or persons.

The Court of Session in like manner and on the same condition may, at any time before judgment is passed with the view of obtaining on the trial the evidence of any person or persons supposed to have been directly or indirectly concerned in, or privy to any offence, tender a pardon to such person or persons.

338. At any time after commitment but before judgment is passed, the Court to which the commitment is made may, with the view of obtaining on the trial the evidence of any person supposed to have been directly or indirectly concerned in or privy to any such offence, tender or order the committing Magistrate or District Magistrate to tender a pardon on the same condition to such person.

439. In the case of any proceeding the record of which has been called for by itself, or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may in its discretion exercise any of the powers conferred.....on a Court by section 338.....

No order under this section shall be made to the prejudice of the accused unless he has had an opportunity of being heard either personally or by pleader in his own defence..... ...

349. When a pardon has been tendered under section 347 or section 348, if it appears to the Magistrate before the trial or to the Court of Session before judgment has been passed, or to the High Court as a Court of Reference or Revision, that any person who has accepted such offer of pardon, has not conformed to the conditions under which the par-

339. Where a pardon has been tendered under section 337 or section 338, and any person who has accepted such tender has, either by wilfully concealing any thing essential or by giving false evidence, not complied with the condition on which the tender was made, he may be tried for the offence in respect of which the pardon was so tendered, or for any other offence of which he appears

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don was tendered, either by wilfully concealing anything essential or by giving false evidence, such Magistrate or Court may commit or direct the commitment of such person for trial for the offence in respect of which the pardon was so tendered.

The statement made by a person under pardon, which pardon has been withdrawn under this section may be put in evidence against him.

to have been guilty in connection with the same matter.

The statement made by a person who has accepted a tender of pardon may be given in evidence against him when the pardon has been withdrawn under this section.

No prosecution for the offence of giving false evidence in respect of such statement shall be entertained without the sanction of the High Court.

Note.

The new law appears to treat the pardon as utterly set aside by the non-compliance with the condition rendered by the person to whom it was tendered. No commitment appears necessary.

The last paragraph of this section is quite new and a very necessary protection.

Admissions not conclusive proof, but may estop.

31 Admissions are not conclusive proof of the matters admitted, but they may operate as estoppels under the provisions hereinafter contained.

Note.

The provisions as to estoppels will be found in Secs. 115-7.

STATEMENTS BY PERSONS WHO CANNOT BE CALLED AS WITNESSES.

Cases in which statement of relevant fact by person who is dead or cannot be found, &c., is relevant.

32. Statements, written or verbal, of relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which, under the circumstances of the case, appears to the Court unreasonable, are themselves relevant facts

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in the following cases:—

When it relates to cause of death;

(1.) When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question.

Such statements are relevant whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question.

Notes.

In *Queen v Degumber Thakoor and others* (19 W. R., Cr., 44) (a case of murder) the statement made by the deceased in the presence of his neighbours and of a head constable was admitted as relevant evidence under this clause, because it provides that such statement is relevant whether the person who made it was or was not, at the time when it was made, under expectation of death. Illustration (a) appeared to apply to that case.

In the proceedings before a Magistrate on a charge of causing grievous hurt, two (among other) witnesses, one of whom was the person assaulted, were examined on behalf of the prosecution. The prisoners were committed for trial. Subsequently the person assaulted died, in consequence of the injuries inflicted on him. At the trial before the Sessions Judge charges of murder and of culpable homicide not amounting to murder were added to the charge of grievous hurt. The deposition of the deceased witness was put in and read at the Sessions trial. *Held* that the evidence was admissible either under this clause or s. 33, notwithstanding the additional charges before the Sessions Court. *Empress v. Rochia Mahato* (I. L. R., 7 Cal. 42; 8 C. L. R., 273).

The declaration of a dying person, albeit made on solemn affirmation before a Magistrate, who was not however the committing Magistrate, and signed by him, is not admissible in evidence without legal proof that the deceased made such a declaration. *Reg v. Fala Adaji and two others* (11 Bom. H. C. R., 247)

Where the accused was charged with culpable homicide not amounting to murder, the question was whether the deceased had died from the effect of a beating. *Held* that a statement made by the deceased that he had been beaten by the accused was admissible in evidence under this section, without proof that, at the time of making the statement, the deceased was conscious of any fatal effect of such beating. *Empress v. Blechynden* (6 C. L. R., 279).

A statement made by a dying person as to the cause of his death and recorded by a Magistrate cannot be treated as a deposition unless made in the presence of the accused before the Magistrate exercising judicial jurisdiction, but must be proved in the ordinary way by a person who heard it made. *In the matter of Samiruddin*, (10 C. L. R., 11.)

or is made in course of business;

(2.) When the statement was made by such person in the ordinary course of business, and in particular when it consists of any entry or memorandum made by him in books kept in the ordinary course of business, or in the discharge of professional duty; or of an acknowledgment written or signed by him of the receipt of money, goods, securities or property of any kind; or of a document used in commerce written or signed by him, or of the date of a letter or other document usually dated, written or signed by him.

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Notes.

In *Reg. v. Hanmanta and others* (I.L.R, 1 Bom., 610) the Bombay High Court *held* that account books containing entries, not made by nor at the dictation of a person, who had a personal knowledge of the truth of the facts stated, if regularly kept in course of business, are admissible as evidence under this clause as well as under s. 34. And account books, though proved not to have been regularly kept in course of business, but proved to have been kept on behalf of a firm of contractors by its servant or agent appointed for that purpose are clearly relevant as admissions against the firm under sections 17, 18 and 21.

or against interest of maker;

(3.) When the statement is against the pecuniary or proprietary interest of the person making it, or when, if true, it would expose him or would have exposed him to a criminal prosecution or to a suit for damages.

or gives opinion as to public right or custom, or matters of general interest;

(4.) When the statement gives the opinion of any such person, as to the existence of any public right or custom or matter of public or general interest, of the existence of which, if it existed, he would have been likely to be aware, and when such statement was made before any controversy as to such right, custom or matter had arisen.

or relates to existence of relationship;

(5.) When the statement relates to the existence of any relationship *by blood, marriage or adoption*, between persons as to whose relationship the person making the statement had special means of knowledge, and when the statement was made before the question in dispute was raised.

Evidence given by a Sangramsing v. Rajaram Bapu I.L.R 12 C 219. *Notes.* pupil of not admissible

The words in italics were added to this clause by s. 2 of Act XVIII of 1872.

Evidence of statements made by a deceased family priest, may be given under this clause. *Sham Lall Singh v. Badha Bibee* (4 C. L. R, 173).

or is made in will or deed relating to family affairs;

(6.) When the statement relates to the existence of any relationship *by blood, marriage or adoption* between persons deceased, and is made in any will or deed relating to the affairs of the family to which any such deceased person belonged, or in any family pedigree, or upon any tombstone, family portrait or other thing on which such statements are usually made, when such statement was made before the question in dispute was raised.

Notes.

The words in italics were added to this clause by s. 2 of Act XVIII of 1872.

or in document relating to transaction mentioned in section 13, Clause (*a*);

(7.) When the statement is contained in any deed, will or other document which relates to any such transaction as is mentioned in section thirteen, Clause (*a.*)

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or is made by several persons, and expresses feelings relevant to matter in question.

(8.) When the statement was made by a number of persons, and expressed feelings or impressions on their part relevant to the matter in question.

Note.

In *Queen v. Ram Dutt Chowdhry*. (23 W. R., Cr., 35). *Jackson, J.*, said "The meaning of this clause evidently is that, when a number of persons assemble together to give vent to one common statement, which statement expresses the feelings or impressions made in their mind at the time of making it, that statement may be repeated by the witnesses and is evidence. It certainly does not mean that a Police officer may go round, collect a gaeat number of statements in different places, and afterwards put those statements in second hand before the Court as evidence which may affect the result of a criminal trial."

Illustrations.

(*a*,) The question is, whether A was murdered by B ; or

A dies of injuries received in a transaction in the course of which she was ravished. The question is, whether she was ravished by B ; or.

The question is, whether A was killed by B under such circumstances that a suit would lie against B by A's widow.

Statements made by A as to the cause of his or her death, referring respectively to the murder, the rape, and the actionable wrong under consideration, are relevant facts.

(*b*.) The question is as to the date of A's birth.

An entry in the diary of a deceased surgeon, regularly kept in the course of business, stating that, on a given day, he attended A's mother and delivered her of a son, is a relevant fact.

(*c*.) The question is, whether A was in Calcutta on a given day.

A statement in the diary of a deceased solicitor, regularly kept in the course of business, that, on a given day, the solicitor attended A at a place mentioned, in Calcutta, for the purpose of conferring with him upon specified business, is a relevant fact.

(*d*.) The question is, whether a ship sailed from Bombay harbour on a given day.

A letter written by a deceased member of a merchant's firm, by which she was chartered, to their correspondents in London to whom the cargo was consigned, stating that the ship sailed on a given day from Bombay harbour, is a relevant fact.

(*e*.) The question is whether rent was paid to A for certain land.

A letter from A's deceased agent to A, saying that he had received the rent on A's account and held it at A's orders, is a relevant fact.

(*f*.) The question is whether A and B were legally married.

The statement of a deceased clergyman that he married them under such circumstances that the celebration would be a crime; is relevant.

(*g*.) The question is, whether A, a person who cannot be found, wrote a letter on a certain day. The fact that a letter written by him is dated on that day is relevant.

(*h*.) The question is, what was the cause of the wreck of a ship.

A protest made by the Captain, whose attendance cannot be procured, is a relevant fact.

(*i*.) The question is whether a given road is a public way.

A statement by A, a deceased headman of the village, that the road was public, is a relevant fact.

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(*j.*) The question is, what was the price of grain on a certain day in a particular market.

A statement of the price, made by a deceased banya in the ordinary course of his business, is a relevant fact.

(*k.*) The question is, whether A, who is dead, was the father of B.

A statement by A that B was his son, is a relevant fact.

(*l.*) The question is, what was the date of the birth of A.

A letter from A's deceased father to a friend, announcing the birth of A on a given day, is a relevant fact.

(*m.*) The question is, whether, and when, A and B were married.

An entry in a memorandum book by C, the deceased father of B, of his daughter's marriage with A on a given date, is a relevant fact.

(*n.*) A sues B for a libel expressed in a painted caricature exposed in a shop window. The question is as to the similarity of the caricature and its libellous character. The remarks of a crowd of spectators on these points may be proved.

Relevancy of certain evidence for proving, in subsequent proceeding the truth of facts therein stated.

33. Evidence given by a witness in a judicial proceeding, or before any person authorized by law to take it, is relevant for the purpose of proving, in a subsequent judicial proceeding, or in a later stage of the same judicial proceeding, the truth of the facts which it states, when the witness is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or if his presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the Court considers unreasonable.

Provided—

that the proceeding was between the same parties or their representatives in interest;

that the adverse party in the first proceeding had the right and opportunity to cross-examine;

that the questions in issue were substantially the same in the first as in the second proceeding.

Explanation.—A criminal trial or inquiry shall be deemed to be a proceeding between the prosecutor and the accused within the meaning of this section.

Notes.

In *Queen v. Mowjan alias Nane Khan* (20 W. R., Cr., 69) *Macpherson, J.*, said "This section gives the Courts new powers, which require to the exercised with great caution. There is no doubt that it is still necessary (just as much as it ever was) to produce every witness at the trial, unless it is proved to be either actually impossible to produce him, or to be so difficult to do so that it is, under the circumstances, unreasonable to insist on his production. In the present case, every thing turns on the evidence of the absent witness; and without it the prosecution must fail. It is therefore, a case in which the provisions of this section ought to be most strictly applied..... We are of opinion that, when the evidence of an absent witness is admitted under this section, the grounds for its admission should be stated fully and clearly so as to enable the High Court to judge of the propriety of its admission.

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In the present case we think it was improperly admitted because there is nothing to show that, by ordinary care and the use of ordinary means, the witness could not have been produced."

Under this section depositions of absent witnesses are only admissible when the prisoner has had the right and opportunity to cross-examine *Queen v. Etwaree Dharee* (21W.R.,Cr.,12). In another case *Phear, J.*, said "The Judge must have considered that the present case fell under the last predicate (of this section). But he does not go so far as to say that he thinks that the presence of the witness could not be obtained without an amount of delay or expense which, under the circumstances of the case, the Court considers unreasonable. He confines himself to saying: "As, therefore, useless delay and expense would be incurred by postponing the case and causing the absent witnesses to appear, it is hereby ordered &c." Now it might very well be that, in the view which the Judge has taken of the case, the delay and expense of postponing the trial in order that the absent witnesses might be able to appear was a useless delay and expense. But it does not follow that the delay and expense of bringing the witnesses was, under all the circumstances of the case, unreasonable. The delay could hardly in a matter of this kind, where the charge against the prisoner was that of having committed murder—the delay of an adjournment to the next Sessions –could not in itself very well be considered unreasonable for the purpose of enabling the case to be duly tried on *viva voce* testimony and the expense that might be attendant upon this delay could hardly of itself, under the circumstances described, be considered unreasonable unless it is so in almost every other case which is tried. This is not a case in which any special difficulty seemed to have occurred in the way of procuring the witnesses, for nothing of a special nature is hinted at by the Judge which should stand in the way of the postponement of the trial. And this being so, we think the condition was not satisfied under which, in pursuance of the provisions of this section, the Judge had discretion to take the depositions of the witnesses instead of and in the place of the oral testimony of the witnesses themselves. *Queen vs. Lukhun Santhal* (21 W. R., Cr., 56).

Couch, C. J., held that this section does not apply to the deposition of a witness in a former suit when the witness is himself a defendant in the subsequent suit and the deposition is sought to be used against him not as evidence given between the parties one of whom called him as a witness but as a statement made by him which would be evidence against him whether he made it as witness or on any other occasion. It is used against him as an admission. This section has no application to such a case as the present. The sections which do apply are the sections relating to admissions. *Soojan Bibee and another v. Achmut Ali and others* (21 W. R., 414).

This section does not justify a Magistrate when proceeding under s. 491 of Act X of 1872 (corresponding with section 107 of Act X of 1882) in using evidence taken in a previous criminal trial in supersession of evidence given in the presence of the accused. *Queen v. Prosunno Chunder Gossami and another* (22 W. R., Cr., 36).

Bhoobun Moyee, as the widow of Hurendro and adoptive mother of the minor Shibendro, brought a suit against Mrino Moyee, describing her as the widow of Romendro Narain and taking no notice of the fact that, at that time, there was in existence an adopted son of Romendro *viz*: Debendro Narain, in whom was vested the property, of which Mrino Moyee was only a manager.

Subsequently, after Debendro Narain's death, Mrino Moyee adopted another infant, Nugendro Narain, and on his behalf, as the expectant successor, on the death of Bhoobun Moyee, to the property of Hurendro, brought a suit against Bhoobun Moyee for a declaration of the invalidity of the adoption of Chunder Kishor. It was *held* that the latter suit was not between the representatives in interest of the parties to the former suit, and a deposition made in the former suit was not admissible in the latter suit under this section. *Mrino Moyee Debia v. Bhoobun Moyee Debia and another* (23 W. R., 42).

A deposition made by a person wherein he denied on oath that he had presented a certain petition in Court which purported to be from him, was *held*

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to be inadmissible as evidence under this section because that person might have been brought into Court but was not brought by those who pleaded the said deposition. *Bhoobun Moyee Dossee and another vs. Umbica Churn Sett and others* (23 W. R., 348).

In *Empress vs. Rochia Mahato* (I.L.R 7. Cal., 428 C. L. R., 278); In the proceedings before a Magistrate on a charge of causing grievous hurt, two (among other) witnesses, one of whom was the person assaulted, were examined on behalf of the prosecution.

The prisoners were committed for trial. Subsequently the person assaulted died in consequence of the injuries inflicted on him. At the trial before the Sessions Judge, charges of murder and of culpable homicide not amounting to murder were added to the charge of grievous hurt. The deposition of the deceased witness was put in and read at the Sessions trial. *Held* that the evidence was admisible either under s. 32 cl. 1, or this section, notwithstanding the additional charges before the Sessions Court. *Pontifex, J.*, said "It appears to us that by "the questions in issue," being required to be "substantially the same" it is not intended that, in a case where the person injured dies subsequently to the inquiry before the Magistrate, his evidence is not to be used before the Sessions Court, because in consequence of his death other charges are framed against the accused. We are of opinion that the evidence of the deceased in this case was admissible under s. 33 and even if it were not admissible under s. 33, that it would be admissible under cl. 1 of s. 32. The question whether the proviso to s. 33 is applicable,—that is, whether the questions at issue are substantially the same,——depends upon whether the same evidence is applicable, although different consequences may follow from the same act. Now here the act was the stroke of the sword which, though it did not immediately cause the death of the deceased person, yet conduced to bring about that result subsequently. In consequence of the person having died, the gravity of the offence became presumptively increased; but the evidence to prove the act with which the accused was charged remained precisely the same. We, therefore, think that this evidence was properly admitted under s. 33."

At the trial of this case it was proved that the other witness, who had been examined before the Magistrate, had disappeared and that it had been found impossible to serve him with a summons. His deposition was put in and read. *Held* that it was properly admitted under this section.

N. B. In this case the defendant was, notwithstanding the heavier charges against him, convicted only of the charge of grievous hurt, the charge for which he was committed.

In *Empress v. Mulu* (I. L. R., 2 All., 646) it was *held* that it is only in extreme cases of delay or expense that the personal attendance of a witness before the Court of Sessions should be dispensed with and the evidence given by him before the committing Magistrate referred to.

A person accused of having committed murder at Zanzibar was sent by the British Consul there for trial before the High Court at Bombay. The Consul had not the power to enforce the attendance of the witnesses at Bombay, but he transmitted to the High Court the depositions which he had taken in the course of the inquiry he had held with regard to the commission of the alleged offence. In the absence of the witnesses the depositions were tendered in evidence at the trial in Bombay. It was *held* that the British Consul at Zanzibar was authorised to take the depositions and that they were admissible in evidence at the trial under this section. *Empress v. Dossaji Gulam Husein* (I. L. R., 3 Bom., 334).

Rami Reddi prosecuted Abbayi Chetti for criminal breach of trust. The latter was acquitted and sanction to prosecute Rami Reddi for making a false charge and Seshu Reddi for giving false evidence was accorded and those two persons were tried and convicted by the same Magistrate who gave the sanction. That conviction was set aside by the Sessions Court on the grouud that the Magistrate having sanctioned the prosecution had no juridiction to try the case. Subsequently the Sessions Judge, having been moved to do so, ordered a new trial. Before the new trial commenced Abbayi died and some of the witnesses also died and others were at a considerable distance from the place of trial and

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their attendance was not easily procurable. The District Magistrate used against the accused persons the evidence given by Tambaya, Muttusami Chetti and Abbayi in the former proceedings.

The Magistrate satisfied himself by legal evidence that the legal conditions had arisen which would enable him to dispense with their personal attendance. Under the explanation to this section, the parties were the same to the proceedings in the breach of trust case and the proceedings against Rami Reddi. Seshu Reddi was merely a witness, not a party in the breach of trust case, and the evidence so admitted was certainly not admissible in the case against him.

The evidence of Abbayi, which was given in a proceeding subsequently pronounced to be one *coram non judice* was not admissible against either Rami Reddi or Seshu Reddi.

Although the Act in using the word 'questions' in the plural, seems to imply that it is essential that all the questions shall be the same in both proceedings to render the evidence admissible, that is not the intention of the law.

The principle involved in requiring the identity of the matter in issue is to secure that in the former proceeding the parties were not without the opportunity of examining and cross-examining to the very point upon which their evidence is adduced in the subsequent proceeding, and though separate proceedings may involve issues, of which some only are common to both, the evidence to those common issues given in the former proceeding may (on the conditions mentioned in this section arising) be given in the subsequent proceeding.

The evidence, therefore, to the fact to which these witnesses speak in the former proceeding was admissible in the subsequent trial against Rami Reddi—*Rami Reddi and Seshu Reddi Petitioners* (I. L. R., 3 Mad., 48)

The words "incapable of giving evidence" in this section denote an incapacity of a permanent, not of a temporary kind; and where a witness is proved to be incapable of giving evidence, the Court has no discretion as to admitting his deposition. But where the absence of a witness is casual or due to a temporary cause (in this case the witness was unable to attend owing to being laid up with small-pox) the Court has such a discretion "if his presence cannot be obtained without an amount of delay or expense, which, under the circumstances the Court considers unreasonable." *In the matter of Piyari Lall and another* (4 C. L, R., 504).

To bring a case within this section, in order to admit a deposition of a witness alleged to be unable to attend by reason of illness, it is not sufficient that such witness should be stated to be ill and confined to the house, but precise evidence should be required by the Court as to the nature of the illness and the incapacity to attend. *Per Pontifex and Field, J. J.*, "the incapacity to give evidence contemplated by this section in our opinion is not necessarily a permanent incapacity"——— *In the matter of Piyari Lall* (4 C. L. R., 504) doubted. *In the matter of Asgur Hossein* (8 C. L. R., 124; I. L. R., 6 Cal., 774).

When a confession is made to a Magistrate by an accused person during an enquiry held previously to the case being taken up by the committing Officer, and by an Officer acting merely as a recording Officer, it must be recorded in strict accordance with the provisions of sections 122 and 346 of Act X of 1872. If the provisions of these sections have not been fully complied with by the recording Officer, the Court of Session may take evidence that the accused person duly made the statement recorded; but a Court of Session, is not at liberty to treat a deposition sent up with the record, and made by the recording Officer before the committing Officer to the effect that the accused person did in fact duly make before him the statement recorded, as evidence of that fact. In such a case, the recording officer must himself be called and examined by the Court of Session, except in cases in which the presence of the recording officer cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the Court of Session considers unreasonable *Noshai Mistri and Ramchurn Halder v. Empress*, (I. L. R., 5 Cal., 958).

The evidence of a witness taken upon commission is not admissible in a criminal trial held before the High Court, unless it can be shown that such evidence was so taken upon an order made by that Court under s. 76 of Act X of 1875, or unless it is admissible under this section. *Empress v. Dabeepershad* (I. L. R., 6 Cal., 582).

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STATEMENTS MADE UNDER SPECIAL CIRCUMSTANCES.

34. Entries in books of account, regularly kept in the course of business, are relevant whenever they refer to a matter into which the Court has to inquire, but such statements shall not alone be sufficient evidence to charge any person with liability.

Entries in books of account when relevant.

Illustration.

A sues B for Rs. 1,000, and shows entries in his account-books showing B to be indebted to him to this amount. The entries are relevant, but are not sufficient, without other evidence, to prove the debt.

Notes.

If any reader is curious to ascertain what was the old law, which this section has replaced, he will find it laid down in the following decisions 8 W. R., 280, 328, 464; 10 W. R, 193, 291; and 11 W. R., 165.

The following decisions have been passed on this section:

Though not alone sufficient to charge any one with liability, jumma wasil baki papers are admissible as evidence under this section, in answer to a claim set up to exemption from enhancement of rent, in order to rebut a presumption arising from uniform payment of rent for 20 years. *Belaet Khan v. Rash Beharee Mookerjea* (22 W. R., 549).

In *Kashee Kishore Roy Chowdhry v. Bama Soondaree Debia Chowdhrain and others* (23 W. R., 27) which was a suit to recover possession of certain lands, plaintiff alleged that he had been in possession on the occasion of a survey award made between himself and defendant B's predecessors, that he afterwards brought an unsuccessful suit for rent against B and others, in which B admitted his title and possession; and that subsequently he brought a suit for a kabooleut against the ryots; in which B intervened but the issue was found against B; it was *held* that the survey award was evidence *quantum valeat* between the parties of the fact of possession; that defendant's alleged admission was an important part of plaintiff's case, and that the plaintiff's cause of action was B's intervention in the rent suit.

See also the case of Reg. *vs.* Hanmanta (I. L. R. Bom., 610) cited in the note to cl. 2, s. 32 (ante p. 34).

Only such books as are entered up as transactions take place can be considered as books kept in the course of business within this section. *Munchershaw Bezonji v. The New Dhurumsey Spinning and Weaving Company* (I. L. R., 4 Bom., 576).

Under this section, jumma wasil baki papers have no weight except as corroborative evidence. *Surnomoyi v. Johur Mahomed Nasyo and others* (10 C. L. R., 545.)

35. An entry in any public or other official book, register, or record, stating a fact in issue or relevant fact, and made by a public servant in the discharge of his official duty, or by any other person in performance of a duty specially enjoined by the law of the country in which such book, register, or record is kept, is itself a relevant fact.

Relevancy of entry in public record, made in performance of duty.

The recital in a judgment is admissible in evidence. 2 R. & M. Notes, p. 378.

The measurement papers, prepared by a butwara Ameen deputed by the Collector to make a partition, do not come within this section. *Mohi Chowdhry v. Dhiro Missrain* (8 C. L. R. 139).

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In *Lekhraj Kuar v. Mahpal Singh and Rajkubans Kuar* (I. L. R., 5 Cal., 744) the Privy Council *held*, on the question whether there did or did not exist a custom in the *Bahrulia* clan in Oudh excluding daughters from inheriting, that the wajib-ul-arz of a mauza in the taluqa, stating the custom of the *Bahrulia* clan as to inheritance, had been properly received in evidence under this section.

This section only provides that "any entry in an official public book, which is duly made by a public servant in the execution of his duty, is of itself a relevant fact;" but it does not make the public book evidence to show that a particular entry *has not been entered in it*. *In the matter of Juggun Lall* (7 C. L. R., 856).

Relevancy of statements in maps, charts and plans.

36. Statements of facts in issue or relevant facts, made in published maps or charts generally offered for public sale, or in maps or plans made under the authority of Government, as to matters usually represented or stated in such maps, charts or plans, are themselves relevant facts.

Relevancy of statement as to fact of public nature, contained in certain Acts or notifications.

37. When the Court has to form an opinion as to the existence of any fact of a public nature, any statement of it, made in a recital contained in any Act of Parliament, or in any Act of the Governor-General of India in Council, or of the Governors in Council of Madras or Bombay, or of the Lieutenant-Governor in Council of Bengal, or in a notification of the Government appearing in the *Gazette of India* or in the Gazette of any Local Government, or in any printed paper purporting to be the *London Gazette* or the *Government Gazette* of any colony or possession of the Queen, is a relevant fact.

Relevancy of statements as to any law contained in law-books.

38. When the Court has to form an opinion as to a law of any country, any statement of such law contained in a book purporting to be printed or published under the authority of the Government of such country and to contain any such law, and any report of a ruling of the Courts of such country contained in a book purporting to be a report of such rulings, is relevant.

How much of a Statement is to be proved.

What evidence to be given when statement forms part of a conversation, document, book, or series of letters or papers.

39. When any statement of which evidence is given forms part of a larger statement, or of a conversation or part of an isolated document, or is contained in a document which forms part of a book, or of a connected series of letters or papers, evidence shall be given of so much and no more of the statement, conversation, document, book, or series of letters or papers as the Court considers necessary in

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that particular case to the full understanding of the nature and effect of the statement, and of the circumstances under which it was made.

JUDGMENTS OF COURTS OF JUSTICE, WHEN RELEVANT.

Previous judgments relevant to bar a second suit or trial.

40. The existence of any judgment, order or decree which by law prevents any Court from taking cognizance of a suit or holding a trial, is a relevant fact when the question is whether such Courts ought to take cognizance of such suit, or to hold such trial.

Notes.

In connection with this section should be read s. 13 of Act XIV of 1882.

"No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties or between parties under whom they or any of them claim, litigating under the same title, in a Court of jurisdiction competent to try such subsequent suit or the suit in which such issue has been subsequently raised and has been heard and finally decided by such Court.

Explanation I.—The matter above referred to must, in the former suit, have been alleged by one party and either denied or admitted expressly or impliedly by the other.

Explanation II.—Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation III.—Any relief claimed in the plaint which is not expressly granted by the decree shall, for the purpose of this section, be deemed to have been refused.

Explanation. IV.—A decision is final within the meaning of this section when it is such as the Court making it could not alter (except on review) on the application of either party or reconsider of its own motion. A decision liable to appeal may be final within the meaning of this section until the appeal is made.

Explanation V.—Where persons litigate *bona fide* in respect of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purpose of this section, be deemed to claim under the persons so litigating.

Explanation VI.—Where a foreign judgment is relied on, the production of the judgment duly authenticated is presumptive evidence that the Court which made it had competent jurisdiction, unless the contrary appear on the record; but such presumption may be removed by proving the want of jurisdiction."

Section 403 of Act X of 1882 should also be read with this section as affording instances in which a judgment of a Criminal Court by law prevents any Court from holding a trial.

"A person who has once been tried by a Court of competent jurisdiction for an offence shall, while such conviction or acquittal remains in force, not be liable to be tried again for the same offence nor on the same facts for any other offence for which a different charge from the one made against him might have been made under section 236, or for which he might have been convicted under section 237.

A person acquitted or convicted of any offence may be afterwards tried for any distinct offence for which a separate charge might have been made against him on the former trial under section 235, paragraph one.

A person convicted of any offence constituted by any act causing consequences which, together with such acts, constituted a different offence from that of which he was convicted, may be afterwards tried for such last mentioned offence, if the consequences had not happened, at the time when he was convicted.

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A person acquitted or convicted of any offence constituted by any act may, notwithstanding such acquittal or conviction, be subsequently charged with, and tried for, any other offence constituted by the same acts which he may have committed if the Court by which he was first tried was not competent to try the offence with which he is subsequently charged.

Explanation.—The dismissal of a complaint, the stopping of proceedings under section 249, the discharge of the accused, or any entry made upon a charge under section 273, is not an acquittal for the purpose of this section.

Illustrations.

(*a.*) A is tried upon a charge of theft as a servant and acquitted. He cannot afterwards, while the acquittal remains in force, be charged with theft as servant, or upon the same facts with theft, or with criminal breach of trust.

(*b.*) A is tried upon a charge of murder and acquitted. There is no charge of robbery; but it appears from the facts that A committed robbery at the time when the murder was committed; he may afterwards be charged with and tried for, robbery.

(*c.*) A is tried for causing grievous hurt and convicted. The person injured afterwards dies. A may be tried again for culpable homicide.

(*d.*) A is charged before the Court of Session and convicted of the culpable homicide of B, A may not afterwards be tried on the same facts for the murder of B.

(*e.*) A is charged by a Magistrate of the first class with, and convicted by him of voluntarily causing hurt to B. A may not afterwards be tried for voluntarily causing grievous hurt to B on the same facts, unless the case comes within paragraph three of this section.

(*f*) A is charged by a Magistrate of the second class with and convicted by him of theft of property from the person of B. A may be subsequently charged with and tried for robbery on the same facts.

(*g.*) A, B and C are charged by a Magistrate of the first class with, and convicted by him of, robbing D. A, B and C may afterwrds be charged with, and tried for, dacoity on the same facts.

Relevancy of certain judgments in probate, &c., jurisdiction.

41. A final judgment, order or decree of a competent Court, in the exercise of probate, matrimonial, admiralty or insolvency jurisdiction, which confers upon or takes away from any person any legal character, or which declares any person to be entitled to any such character, or to be entitled to any specific thing, not as against any specified person but absolutely, is relevant when the existence of any such legal character, or the title of any such person to any such thing, is relevant.

Such judgment, order or decree is conclusive proof

that any legal character which it confers accrued at the time when such judgment, order or decree came into operation;

that any legal character, to which it declares any such person to be entitled, accrued to that person at the time when such judgment, *order or decree*, declares it to have accrued to that person;

that any legal character which it takes away from any such person ceased at the time from which such judgment, order or *decree*, declared that it had ceased or should cease;

and that anything to which it declares any person to be so entitled was the property of that person at the time from which

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such judgment, *order or decree*, declares that it had been or should be his property.

Note.

The words in italics were added to this section by s. 3 of Act XVIII of 1872.

Relevancy and effect of judgments orders or decrees, other than those mentioned in section 41.

42. Judgments, orders or decrees other than those mentioned in section forty-one, are relevant if they relate to matters of a public nature relevant to the enquiry; but such judgments, orders or decrees are not conclusive proof of that which they state.

Illustrations.

A sues B for trespass on his land. B alleges the existence of a public right of way over the land, which A denies.

The existence of a decree in favour of the defendant, in a suit by A against C for a trespass on the same land, in which C alleged the existence of the same right of way, is relevant, but it is not conclusive proof that the right of way exists.

Judgments, &c., other than those mentioned in sections 40-42, when relevant.

43. Judgments, orders or decrees, other than those mentioned in sections forty, forty-one and forty-two, are irrelevant, unless the existence of such judgment, order or decree, is a fact in issue, or is relevant under some other provision of this Act.

Illustrations.

(*a.*) A and B separately sue C for a libel which reflects upon each of them. C in each case says, that the matter alleged to be libellous is true, and the circumstances are such that it is probably true in each case or in neither.

A obtains a decree against C for damages on the ground that C failed to make out his justification. The fact is irrelevant as between B and C.

(*b.*) A prosecutes B for adultery with C, A's wife. B denies that C is A's wife, but the Court convicts B of adultery.

Afterwards, C is prosecuted for bigamy in marrying B during A's lifetime. C says that she never was A's wife.

The judgment against B is irrelevant as against C.

(*c.*) A prosecutes B for stealing a cow from him. B is convicted.

A afterwards sues C for the cow, which B had sold to him before his conviction. As between A and C, the judgment against B is irrelevant.

(*d.*) A has obtained a decree for the possession of land against B. C, B's son, murders A in consequence.

The existence of the judgment is relevant, as showing motive for a crime.

(*e*) A is charged with theft and with having been previously convicted of theft. The previous conviction is relevant as evidence of bad character.

Notes.

In the case of *Gulla Lall v. Fateh Lall* (I. L. R., 6 Cal., 171; 6 C. L. R., 439) *Garth, C. J.*, said "It is true that s. 40 might have been more clearly worded. It has, in fact, much the same defect as s. 2 of Act VIII of 1859 which was pointed out by the P. C. in *Soorjeemoney Dayee v. Suddanund Mohapatter* (12 B. L. R., 304). But I cannot doubt

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that it was intended to include all judgments, which by law operate to prevent a Court, whether civil or criminal, from taking cognizance of a suit or trying any particular issue. The words "holding a trial" are amply large enough to admit of this construction; and it is not because in some other Act the words "holding a trial" may have been construed to refer to criminal trials only that we ought to confine their meaning in the same way in s. 40.....,...S. 40 in my opinion, admits as evidence all judgments *inter partes* which would operate as *res judicata* in a second suit.

S. 41 admits judgments *in rem* as evidence in all subsequent suits where the existence of the right is in issue, whether between the same parties or not, and section 42 admits all judgments not as *res judicatæ*, but as evidence, although they may not be between the same parties, provided they relate to matters of a public nature relevant to the enquiry..... .....

But then it said that s. 43 expressly contemplates cases in which judgments would be admissible under other sections of the Act, which are not admissible under ss. 40, 41 or 42. This is quite true. But then I take it, that the cases so contemplated by s. 43 are those where a judgment is used, not as a *res judicata*, or as evidence more or less binding on an opponent by reason of the adjudication which it contains (because judgments of that kind had already been dealt under one or other of the immediately preceding sections). But the cases referred to in s. 43 are such, I conceive, as the section itself illustrates, viz: when the fact of any particular judgment having been given is a matter to be proved in the case. As for instance if A sued B for slander, in saying that he had been convicted of forgery, and B justified upon the ground that the alleged slander was true, the conviction of A for forgery would be a fact to be proved by B like any other fact in the case and quite irrespective of whether A had been actually guilty of the forgery or not. This I conceive would be one of the many cases alluded to in s. 43.

In Naranji Bhikabhai v. Dipa Umed (I. L. R., Bom., 3,) *Westropp, C. J.*, held that the words in s. 43 "unless the existence of the judgment is relevant under some other provision of this Act" introduce another section of this Act namely s. 13.

In *Reg. v. Parbhudas Ambaram and others* (11 Bom H. C. R., 90) *West, J., held* that where a person charges another with having forged a promissory note, and denies having ever executed any promissory note at all, the evidence that a note, similar to the one alleged to be forged, was, in fact, executed by that person, is not admissible, nor even would a judgment, founded upon such a note, be so.

In the case of *Neamut Ali v. Gooroodass* cited in the notes to s. 13 (ante p. 10) it was *held* that the proceedings in the suits mentioned in that report were admissible as evidence in this case under s. 43, not as conclusive, but as of such weight as the Court might think they ought to have.

Fraud or collusion in obtaining judgment, or incompetency of Court, may be proved.

44. Any party to a suit or other proceeding may show that any judgment, order or decree which is relevant under section forty, forty-one or forty-two, and which has been proved by the adverse party, was delivered by a Court not competent to deliver it, or was obtained by fraud or collusion.

OPINIONS OF THIRD PERSONS, WHEN RELEVANT.

Opinions of experts.

45. When the Court has to form an opinion upon a point of foreign law, or of science or art, or as to identity of hand-writing, the opinions upon that point of persons specially skilled in such foreign law, science

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or art, *or in questions as to identity of hand-writing* are relevant facts.

Such persons are called experts.

Illustrations.

(*a.*) The question is whether the death of A was caused by poison.

The opinions of experts as to the symptoms produced by the poison by which A is supposed to have died, are relevant.

(*b.*) The question is whether A at the time of doing a certain act, was by reason of unsoundness of mind, incapable of knowing the nature of the act, or that he was doing what was either wrong or contrary to law.

The opinions of experts upon the question whether the symptoms exhibited by A commonly show unsoundness of mind and whether such unsoundness of mind usually renders persons incapable of knowing the nature of the acts which they do, or of knowing that what they do is either wrong or contrary to law, are relevant.

(*c.*) The question is whether, a certain document was written by A. Another document is produced which is proved or admitted to have been written by A.

The opinions of experts on the question whether the two documents were written by the same person or by different persons are relevant.

Note.

The words in italics were added to this section by Sec. 4 of Act XVIII of 1872.

Facts bearing upon opinions of experts.

46. Facts, not otherwise relevant, are relevant if they support or are inconsistent with the opinions of experts, when such opinions are relevant.

Illustrations.

(*a.*) The question is whether A was poisoned by a certain poison.

The fact that other persons, who were poisoned by that poison, exhibited certain symptoms which experts affirm or deny to be the symptoms of that poison, is relevant.

(*b.*) The question is whether an obstruction to a harbour is caused by a certain sea-wall.

The fact that other harbours similarly situated in other respects, but where there were no such sea-walls, began to be obstructed at about the same time, is relevant.

Opinion as to handwriting, when relevant.

47. When the Court has to form an opinion as to the person by whom any document was written or signed, the opinion of any person acquainted with the handwriting of the person by whom it is supposed to be written or signed that it was or was not written or signed by that person, is a relevant fact.

Explanation:——A person is said to be acquainted with the handwriting of another person when he has seen that person write, or when he has received documents purporting to be written by that person in answer to documents written by himself or under his authority and addressed to that person, or

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when, in the ordinary course of business, documents purporting to be written by that person have been habitually submitted to him.

Illustration.

The question is whether a given letter is in the handwriting of A, a merchant in London.

B is a merchant in Calcutta, who has written letters addressed to A and received letters purporting to be written by him. C is B's clerk, whose duty it was to examine and file B's correspondence. D is B's broker, to whom B habitually submitted the letters purporting to be written by A for the purpose of advising with him thereon.

The opinions of B, C and D on the question whether the letter is in the handwriting of A are relevant, though neither B, C nor D ever saw A write.

Opinion as to existence of right or custom, when relevant.

48. When the Court has to form an opinion as to the existence of any general custom or right, the opinions, as to the existence of such custom or right, of persons who would be likely to know of its existence if it existed, are relevant.

Explanation:—The expression 'general custom or right' includes customs or rights common to any considerable class of persons.

Illustration.

The right of the villagers of a particular village to use the water of a particular well is a general right within the meaning of this section.

Opinions as to usages, tenets, &c., when relevant.

49. When the Court has to form an opinion as to—

the usages and tenets of any body of men or family,

the constitution and government of any religious or charitable foundation, or

the meaning of words or terms used in particular districts or by particular classes of people,

the opinions of persons having special means of knowledge thereon, are relevant facts.

Opinion on relationship, when relevant.

50. When the Court has to form an opinion as to the relationship of one person to another, the opinion, expressed by conduct, as to the existence of such relationship, of any person who, as a member of the family or otherwise, has special means of knowledge on the subject, is a relevant fact: Provided that such opinion shall not be sufficient to prove a marriage in proceedings under the Indian Divorce Act, or in prosecutions under section four hundred and ninety-four, four hundred and ninety-five, four hundred and

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ninety-seven, or four hundred and ninety-eight of the Indian Penal Code.

Illustrations.

(*a.*) The question is, whether A and B were married.

The fact that they were usually received and treated by their friends as husband and wife is relevant.

(*b.*) The question is, whether A was the legitimate son of B. The fact that A was always treated as such by members of the family, is relevant.

Notes.

The provisions of this section have been held by a Full Bench to show very plainly that where marriage is an ingredient in the offence as in bigamy, adultery and the enticing of married women, the fact of the marriage must be strictly proved in the regular way. *Empress v. Pitamber Singh* (I. L. R. 5 Cal. 566).

The sections mentioned in this section relate to the following offences :—494, marrying again in the lifetime of husband or wife ; 495, marrying again in the lifetime of husband or wife, having concealed from the person with whom the subsequent marriage is contracted the fact of the former marriage ; 497, adultery and 498, taking or enticing away another man's wife from that man or from any person having the care of her on behalf of that man with intent that she may have illicit intercourse with another person or concealing or detaining with that intent any such woman.

Grounds of opinion, when relevant.

51. Whenever the opinion of any living person is relevant, the grounds on which such opinion is based are also relevant.

Illustrations.

An expert may give an account of experiments performed by him for the purpose of forming his opinion.

CHARACTER WHEN RELEVANT.

In civil cases character to prove conduct imputed, irrelevant.

52. In civil cases, the fact that the character of any person concerned is such as to render probable or improbable any conduct imputed to him, is irrelevant, except in so far as such character appears from facts otherwise relevant.

Note.

By the explanation to s. 55 the word character in this section includes both reputation and disposition ; but evidence may be given only of general reputation and general disposition and not of particular acts by which reputation or disposition were shown.

In criminal cases, previous good character relevant.

53. In criminal proceedings, the fact that the person accused is of a good character, is relevant.

Notes.

The word character in this section includes both reputation and disposition ; but evidence may be given only of general reputation and general disposition and not of particular acts by which reputation or disposition were shown (see explanation to s. 55).

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54. In criminal proceedings, the fact that the accused person has been previously convicted of any offence is relevant; but the fact that he has a bad character is irrelevant, unless evidence has been given that he has a good character, in which case it becomes relevant.

In Criminal proceedings previous conviction relevant but not previous bad character, except in reply.

Explanation 1.—This section does not apply to cases in which the bad character of any person is itself a fact in issue.

Explanation 2. A previous conviction is relevant as evidence of bad character.

Notes.

The word character in this section includes both reputation and disposition; but evidence may be given only of general reputation and general disposition, and not of particular acts by which reputation and disposition were shown (See explanation to s. 55).

In charging a Jury upon the trial of a Prisoner for being dishonestly in the possession of stolen goods, the Judge directed the jury to consider the proof of previous convictions for theft as evidence from which inference might fairly be drawn as to the character of the accused. *Held* that this amounted to a misdirection; for though this section declares that "the fact that the accused person has been previously convicted is relevant," yet the same section also declares that "the fact that he has a bad character is irrelevant" and that the evidence was irrelevant and inadmissible. Except under very special circumstances, the proper object of using previous conviction is to determine the amount of punishment to be awarded, should the prisoner be convicted of the offence charged. *Roshun Doosadh and others v. Empress* (I. L. R., 5 Cal. 768; 6 C. L. R., 219).

The provisions of s. 310 of Act X. of 1882, which are very important, will prevent, it is to be hoped, such an error as the Sessions Judge in the last mentioned case committed.

"In the case of a trial by jury or with the aid of assessors where the accused is charged with an offence committed after a previous conviction, for any offence, the procedure laid down in sections 271, 286, 305, 306 and 309 shall be modified as follows:

(*a.*) The part of the charge stating the previous conviction shall not be read out in Court, nor shall the accused be asked whether he has been previously convicted as alleged in the charge, unless and until he has either pleaded guilty to, or been convicted of, the subsequent offence.

(*b.*) If he pleads guilty to, or is convicted of, the subsequent offence, he shall then be asked whether he has been previously convicted as alleged in the charge.

(*c.*) If he answers that he has been so previously convicted, the Judge may proceed to pass sentence on him accordingly; but, if he denies that he has been so previously convicted, or refuses to, or does not, answer such question, the Jury or the Court and the Assessors (as the case may be) shall then inquire concerning such previous conviction, and in such case (where the trial is by jury) it shall not be necessary to swear the jurors again.

55. In civil cases, the fact that the character of any person is such as to affect the amount of damages which he ought to receive, is relevant.

Character as affecting damages.

Explanation.—In sections fifty-two, fifty-three, fifty-four, and fifty-five, the word character includes both reputation and disposition; but evidence may be given only of general reputation and general disposition, and not of particular acts by which reputation or disposition were shown.

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PART II.

ON PROOF.

CHAPTER III.

FACTS WHICH NEED NOT BE PROVED.

Facts judicially noticeable need not be proved.

56. No fact of which the Court will take judicial notice need be proved.

Facts of which Court must take judicial notice.

57. The Court shall take judicial notice of the following facts :—

(1.) All laws or rules having the force of law now or heretofore in force or hereafter to be in force in any part of British India :

(2.) All public Acts passed or hereafter to be passed by Parliament and all local and personal Acts directed by Parliament to be judicially noticed :

(3.) Articles of War for Her Majesty's Army or Navy :

(4.) The course of proceeding of Parliament and of the Councils for the purpose of making Laws and Regulations established under the Indian Councils Act, or any other law for the time being relating thereto :

Explanation.—The word 'Parliament,' in clauses (two) and (four) includes—

1. The Parliament of the United Kingdom of Great Britain and Ireland ;
2. The Parliament of Great Britain ;
3. The Parliament of England ;
4. The Parliament of Scotland, and
5. The Parliament of Ireland ;

(5.) The accession and the sign manual of the Sovereign for the time being of the United Kingdom of Great Britain and Ireland :

(6.) All seals of which English Courts take judicial notice : the seals of all the Courts of British India, and of all Courts out of British India, established by the authority of the Governor General or any Local Government in Council : the seals of Courts of Admiralty and Maritime Jurisdiction and of Notaries Public, and all seals which any person is authorized to use by any Act of Parliament or other Act or Regulation having the force of law in British India :

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(7.) The accession to office, names, titles, functions, and signatures of the persons filling for the time being any public office in any part of British India, if the fact of their appointment to such office is notified in the *Gazette of India*, or in the official Gazette of any Local Government:

(8.) The existence, title, and national flag of every State or Sovereign recognized by the British Crown:

(9.) The divisions of time, the geographical divisions of the world, and public festivals, fasts and holidays notified in the official Gazette:

(10.) The territories under the dominion of the British Crown:

(11.) The commencement, continuance, and termination of hostilities between the British Crown and any other State or body of persons:

(12.) The names of the members and officers of the Court, and of their deputies and subordinate officers and assistants, and also of all officers acting in execution of its process, and of all advocates, attornies, proctors, vakils, pleaders and other persons authorized by law to appear or act before it:

(13.) The rule of the road, *on land or at sea.*

In all these cases, and also on all matters of public history, literature, science or art, the Court may resort for its aid to appropriate books or documents of reference.

If the Court is called upon by any person to take judicial notice of any fact, it may refuse to do so, unless and until such person produces any such book or document as it may consider necessary to enable it to do so.

Notes.

The words in italics were added to this section by Sec. 5 of Act XVIII of 1872.

A document purporting to be a copy of a decision passed by one Abdullah, a Kazi or Sudder Ameen of Chittagong, in 1820, having been tendered in evidence, it appeared that the seal was not distinctly legible. The fact of the appointment of Abdullah was not proved, nor was it shewn that in 1820 there existed any Official Gazette in which the appointments of Kazis or Sudder Ameens were usually notified. There was further no certificate that the copy was a true copy. *Held*, that the Court could not take judicial notice of the appointment of Abdulla under cl. 7 of this section, nor of the seal under cl. 6 of this section, and that, therefore, no presumption could be made in favour of the document as being more than 30 years old. *Jaker Ali Chowdhry v. Rajchunder Sen and another; Taher Ali Chowdhry v. Aukhil Chunder Sen* (10 C. L. R., 469).

Facts admitted need not be proved.

58. No fact need be proved in any proceeding which the parties thereto or their agents agree to admit at the hearing, or which, before the hearing, they agree to admit by any writing under their hands, or which by any rule of pleading in force at the time

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they are deemed to have admitted by their pleadings: Provided that the Court may, in its discretion, require the facts admitted to be proved otherwise than by such admissions.

CHAPTER IV.

Of Oral Evidence.

Proof of facts by oral evidence.

59. All facts, except the contents of documents, may be proved by oral evidence.

Oral evidence must be direct.

60. Oral evidence must, in all cases whatever, be direct; That is to say—

If it refers to a fact which could be seen, it must be the evidence of a witness who says he saw it;

If it refers to a fact which could be heard, it must be the evidence of a witness who says he heard it;

If it refers to a fact which could be perceived by any other sense or in any other manner, it must be the evidence of a witness who says he perceived it by that sense or in that manner;

If it refers to an opinion or to the grounds on which that opinion is held, it must be the evidence of the person who holds that opinion on those grounds;

Provided that the opinions of experts expressed in any treatise commonly offered for sale, and the grounds on which such opinions are held, may be proved by the production of such treatises if the author is dead or cannot be found, or has become incapable of giving evidence, or cannot be called as a witness without an amount of delay or expense which the Court regards as unreasonable:

Provided also that, if oral evidence refers to the existence or condition of any material thing other than a document, the Court may, if it thinks fit, require the production of such material thing for its inspection.

CHAPTER V.

Of Documentary Evidence.

Proof of contents of documents.

61. The contents of documents may be proved either by primary or by secondary evidence.

Primary evidence.

62. Primary evidence means the document itself produced for the inspection of the Court.

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Explanation 1.—Where a document is executed in several parts, each part is primary evidence of the document :

Where a document is executed in counterpart, each counterpart being executed by one or some of the parties only, each counterpart is primary evidence as against the parties executing it.

Explanation 2.—Where a number of documents are all made by one uniform process, as in the case of printing, lithography, or photography, each is primary evidence of the contents of the rest; but where they are all copies of a common original, they are not primary evidence of the contents of the original.

Illustration.

A person is shown to have been in possession of a number of placards, all printed at one time from one original. Any one of the placards is primary evidence of the contents of any other, but no one of them is primary evidence of the contents of the original.

Secondary evidence.

63. Secondary evidence means and includes——

(1.) Certified copies given under the provisions hereinafter contained ;

(2.) Copies made from the original by mechanical processes which in themselves insure the accuracy of the copy, and copies compared with such copies ;

(3.) Copies made from or compared with the original ;

(4.) Counterpart of documents as against the parties who did not execute them ;

(5.) Oral accounts of the contents of a document given by some person who has himself seen it.

Illustrations.

(*a.*) A photograph of an original is secondary evidence of its contents, though the two have not been compared, if it is proved that the thing photographed was the original.

(*b.*) A copy compared with a copy of a letter made by a copying machine is secondary evidence of the contents of the letter, if it is shown that the copy made by the copying machine was made from the original.

(*c.*) A copy transcribed from a copy, but afterwards compared with the original, is secondary evidence ; but the copy not compared is not secondary evidence of the original, although the copy from which it was transcribed was compared with the original.

(*d.*) Neither an oral account of a copy compared with the original, nor an oral account of a photograph or machine-copy of the original, is secondary evidence of the original.

Notes.

A defendant, who does not object to the admission of secondary evidence at the time it is admitted, cannot be allowed to object to it in Special Appeal. And where

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the oral evidence taken fell short of the requirements of this section, only because the witnesses were not properly questioned, the High Court in Special Appeal *Held* it to be unjust to let the plaintiff suffer on account of the inefficiency of his legal adviser and so remanded the case for retrial. *Lochun Singh v. Hetnarain Singh and others* (24 W. R., 232).

A lets lands to B, who sublet to C, a ryot. C sued for possession of part, after an alleged dispossession making A a party defendant to the suit. At the hearing, C, in order to prove that the lands in dispute were part of those let to him by B, tendered in evidence the kabuliat given by him to B ; *Held* that C should have produced the pottah given him by B, and the grant from A to B, or sufficiently accounted for their absence ; and that, as he did not do either, the kabuliat (which was merely secondary evidence of the pottah) was inadmissible, even though it was produced from the possession of the landlord A. *Surjo Narain Ghose and others v. Hurri Narain Mollo and others* (1 C. L. R., 547).

Proof of documents by primary evidence.

64. Documents must be proved by primary evidence except in the cases hereinafter mentioned.

Cases in which secondary evidence relating to documents may be given.

65. Secondary evidence may be given of the existence, condition, or contents of a document in the following cases :—

(a.) When the original is shown or appears to be in the possession or power

of the person against whom the document is sought to be proved, or

of any person out of reach of, or not subject to the process of the Court, or

of any person legally bound to produce it,

and when, after the notice mentioned in section sixty-six, such person does not produce it ;

(b.) When the existence, condition or contents of the original have been proved to be admitted in writing by the person against whom it is proved or by his representative in interest ;

(c.) When the original has been destroyed or lost, or when the party offering evidence of its contents can not, for any other reason not arising from his own default or neglect, produce it in reasonable time ;

(d.) When the original is of such a nature as not to be

(e.) When the original is a public document within the meaning of section seventy-four ;

(f.) When the original is a document of which a certified copy is permitted by this Act, or by any other law in force in British India, to be given in evidence ;

(g.) When the originals consist of numerous accounts or other documents which cannot conveniently be examined in Court, and the fact to be proved is the general result of the whole collection.

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In cases (*a*), (*c*) and (*d*), any secondary evidence of the contents of the document is admissible.

In case (*b*), the written admission is admissible.

In case (*e*) or (*f*), a certified copy of the document, but no other kind of secondary evidence is admissible.

In case (*g*), evidence may be given as to the general result of the documents by any person who has examined them, and who is skilled in the examination of such documents.

Notes.

Secondary evidence of the contents of a document is admissible where the Court is satisfied that the document has been lost (cl. c,) and in such a case it is open to the Court to receive oral evidence of the transaction and it was not necessary to insist on the production of a certified copy. A registered deed of sale is not a public document within the meaning of s. 74., nor is it a document of which a certified copy is permitted by this Act or "by any other law in force in British India to be given in evidence." By the words "to be given in evidence," the Court understood, to be given in evidence without having been introduced by other evidence. S. 57 of Act VIII. of 1871 (which has been re-enacted with immaterial alteration by S. 57 of Act III. of 1877) only showed that when secondary evidence has in any way been introduced, as in this case, by proof of the loss of the original document, a copy certified by the Registrar shall be admissible for the purpose of proving the contents of the original. *Hurish Chunder Mullick v. Prosunno Coomar Banerjea and others* (22 W. R., 303).

In a case falling under cl. (f) of this section and also under cl. (a) or (c) of the same section, *any* secondary evidence is admissible. *In the matter of a Collision between the Ava and Brenhilda* (I. L. R., 5 Cal., 569).

Secondary evidence of the contents of a document requiring execution which can be shown to have been last in proper custody and to have been lost, and which is more than 30 years old may be admitted under cl. (c) of this section and s. 90 without proof of the execution of the original. *Khetter Chunder Mookerjea v. Khetter Paul Sreeterutno and others* (I. L. R., 5 Cal., 886; 6 C. L. R., 199).

In a suit by the purchaser of a debt, the plaintiff stated that, in 1873, A executed a bond in favour of B to secure the repayment of Rs. 1000, and that he had purchased the interest of B at a sale in execution of a decree against him. The plaintiff now sued A upon the bond, making B a party. At the trial, A denied the execution of the bond, and it was not produced by the plaintiff, who, having served B with notice to produce, tendered secondary evidence of its contents, B was not examined as a witness and no evidence was given of the loss or destruction of the bond. *Held* per *Pontifex and Morris, J.J.*, (*Prinsep, J.*, dissenting) that secondary evidence was not admissible. *Womesh Chunder Ghose v. Shama Sundari Bai* (I. L., R., 7 Cal., 98; 8 C. L. R., 489).

Rules as to notice to produce.

66. Secondary evidence of the contents of the documents referred to in section sixty-five, clause (*a*), shall not be given unless the party proposing to give such secondary evidence has previously given to the party in whose possession or power the document is, *or to his attorney or pleader*, such notice to produce it as is prescribed by law; and if no notice is prescribed by law then such notice as the Court considers reasonable under the circumstances of the case:

Provided that such notice shall not be required in order to render secondary evidence admissible in any of the following cases,

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or in any other case in which the Court thinks fit to dispense with it:—

(1.) When the document to be proved is itself a notice;

(2.) When from the nature of the case, the adverse party must know that he will be required to produce it;

(4.) When it appears or is proved that the adverse party has obtained possession of the original by fraud or force;

(4.) When the adverse party or his agent has the original in Court;

(5) When the adverse party or his agent has admitted the loss of the document;

(6.) Where the person in possession of the document is out of reach of, or not subject to, the process of the Court.

Notes.

The words in italics were added to this section by s. 6. of Act XVIII of 1872.

The following sections of the Civil Procedure Code (Act XIV of 1882) will be useful to the reader.

S. 59. If a plaintiff *sues* upon a document in his possession or power he shall produce it in Court when the plaint is presented, and shall at the same time deliver the document or a copy thereof to be filed with the plaint.

If he *rely* on any other documents (whether in his possession or power or not) as *evidence* in support of his claim, he shall enter such documents in a list to be added or annexed to the plaint.

S. 60. In the case of any such document not in his possession or power, he shall, if possible, state in whose possession or power it is.

S. 61. In the case of any suit *founded* upon a negotiable instrument, if it be *proved* that the instrument is *lost*, and if an indemnity be given by the plaintiff, to the satisfaction of the Court, against the claims of any other person upon such instrument, the Court may make such decree as it would have made if the plaintiff had *produced* the instrument in Court when the plaint was presented, and had at the same time delivered a copy of the instrument to be filed with the plaint.

S. 62. If the document on which the plaintiff *sues* be an entry in a shop-book or other book in his possession or power, the plaintiff shall produce the book at the time of filing the plaint, together with a copy of the entry on which he relies.

The Court, or such officer as it appoints in this behalf, shall forthwith mark the document for the purpose of identification; and after examining and comparing the copy with the original and attesting the copy, if found correct, shall return the book to the plainaiff and cause the copy to be filed.

S. 63. A document which ought to be produced in Court by the plaintiff when the plaint is presented, or to be entered in the list to be added or annexed to the plaint, and which is not produced or entered accordingly shall not, without the leave of the Court, be received in evidence on his behalf at the hearing of the suit.

Nothing in this section applies to documents produced for cross-examination of defendant's witnesses, or in answer to any case set up by the defendant, or handed to a witness merely to refresh his memory.

S. 70. The summons to appear and answer shall order the defendant to produce any document in his possession or power, containing evidence relating to the merits of the plaintiff's case, or upon which the defendant intends to rely in support of his case.

S. 128. Either party may, by a notice through the Court, within a reasonable time not less than ten days before the hearing, require the other party to admit (saving all just exceptions to the admissibility of such document in evidence,) the genuineness of any document material to the suit.

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The admission shall also be made in writing, signed by the other party or his pleader and filed in Court.

If such notice be not given, no costs of proving such document shall be allowed, unless the Judge otherwise orders.

If such notice is not complied with within four days after its being served, and the Judge thinks it reasonable that the admission should have been made, the party refusing shall bear the expense of proving such document whatever may be the result of the suit.

S. 129. The Court, may, at any time during the pendency therein of the suit, order any party to the suit to declare by affidavit *all* the documents which are or have been in his possession or power relating to any matter in question in the suit, and any party to the suit may, at any time before the first hearing, apply to the Court for a like order.

Every affidavit made under this section shall specify which, if any, of the documents therein mentioned, the declarant objects to produce, together with the grounds of such objection.

S. 130. The Court may, at any time during the pendency therein of any suit, order the production by any party thereto of such of the documents in his possession or power relating to any matter in question in such suit or proceeding as the Court thinks right; and the Court may deal with such documents when produced in such manner as appears just.

S. 131. Any party to a suit may, at any time before or at the hearing thereof give notice through the Court to any other party to produce any specified document for the inspection of the party giving such notice or of his pleader, and to permit, such party or pleader to take copies thereof.

No party failing to comply with such notice shall afterwards be at liberty to put any such document in evidence on his behalf in such suit, unless he satisfies the Court that such document relates only to his own title or that he had some other and sufficient cause for not complying with such notice.

S. 132. The party to whom such notice is given shall, within ten days from the receipt thereof, deliver through the Court to the party giving the same a notice stating a time, within three days from such delivery, at which the documents, or such of them as he does not object to produce, may be inspected at his pleader's office or some other convenient place, and stating which, if any, of the documents he objects to produce, and on what grounds.

S. 133. If any party served with notice under s. 131 omits to give notice under s. 132 of the time for inspection, or objects to give inspection, or names an inconvenient place for inspection, the party desiring it may apply to the Court for an order of inspection.

S. 134. Except in the case of documents referred to in the plaint, written statement or affidavit of the party against whom the application is made, or disclosed in his affidavit of documents, such application shall be founded upon an affidavit showing *(a)* of what documents inspection is sought, *(b)* that the party applying is entitled to inspect them and *(c)* that they are in the possession or power of the party against whom the application is made.

S. 135. If the party from whom discovery of any kind or inspection is sought objects to the same or any part thereof, and if the Court is satisfied that the right to such discovery or inspection depends on the determination of any issue or question in dispute in the suit, or that for any other reason it is desirable that any such issue or question should be determined before deciding upon the right to the discovery or inspection, the Court may order that the issue or question be determined first and reserve the question as to the discovery or inspection.

S. 136. If any party fails to comply with any order under this chapter (X)..... for discovery, production or inspection which has been duly served, he shall, if a plaintiff, be liable to have his suit dismissed for want of prosecution, and if a defendant, to have his defence, if any, struck out and to be placed in the same position as if he had not appeared and answered:

And the party .....seeking discovery, production or inspection may apply to the Court for an order to that effect, and the Court may make such order:

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Any party failing to comply with any order under this chapter (X).....for discovery, production or inspection, which has been served *personally* upon him, shall also be deemed guilty of an offence under s. 188 of the Indian Penal Code.

S. 137. The Court may of its own accord, and may of its discretion upon the application of any of the parties to a suit, send for, either from its own records or from any other Court, the record of any other suit or proceeding and inspect the same.

Every application made under this section shall (unless the Court otherwise directs) be supported by an affidavit of the applicant or his pleader, showing how the record is material to the suit in which the application is made and that the applicant cannot, without unreasonable delay or expense obtain a duly authenticated copy of the record or of such portion thereof as the applicant requires, or that the production of the original is necessary for the purposes of justice.

Nothing contained in this section shall be deemed to enable the Court to use in evidence any document which under the Indian Evidence Act, 1872, would be inadmissible in the suit.

S. 138. The parties or their pleaders shall bring with them and have in readiness at the first hearing of the suit, to be produced when called for by the Court, all the documentary evidence of every description in their possession or power, on which they intend to rely, and which has not already been filed in Court, and all documents which the Court at any time before such hearing has ordered to be produced.

S. 139. No documentary evidence in the possession or power of any party, which should have been, but has not been, produced in accordance with the requirements of section 138, shall be received at any subsequent stage of the proceedings unless good cause be shown to the satisfaction of the Court for the non-production thereof and the Judge receiving any such evidence shall record his reasons for so doing.

S. 140. The Court shall receive the documents respectively produced by the parties at the first hearing, provided that the documents produced by each party be accompanied by an accurate list thereof prepared in such form as the High Court may from time to time direct.

The Court may at any stage of the suit reject any document which it considers irrelevant or otherwise inadmissible, recording the grounds of its rejection.

S. 141. No document shall be placed on the record unless it has been proved or admitted in accordance with the law of evidence for the time being in force. Every document proved or admitted shall be endorsed with the number and title of the suit, the name of the person producing it and the date on which it was produced. The Judge shall then endorse with his own hand a statement that it was proved against or admitted by (as the case may be) the person against whom it is used. The document shall then be filed as part of the record:

Provided that, if the document be an entry in a shop-book or other book the party on whose behalf such book is produced may furnish a copy of the entry which may be endorsed as aforesaid, and shall be filed as part of the record, and the Court shall mark the entry, and shall then return the book to the person producing it.

All documents produced at the first hearing and not so proved or admitted shall be returned to the parties respectively producing them.

S. 142. When a document so proved or admitted is relied on as evidence by either party, but the Court considers it inadmissible, it shall be further endorsed with the addition of the word "rejected" and the endorsement shall be signed by the Judge.

The document shall then be returned to the party who produced it.

S. 143 authorises the Court for sufficient cause to direct any document or book produced before it in any suit to be impounded and kept in the custody of an officer of the Court for such period and subject to such conditions as the Court thinks fit.

Under s. 144, documents are to be returned forthwith after decision of suit if no appeal is allowed, and if appeal is allowed then after the appeal, if preferred, has been disposed of, or after the time for appealing has passed, unless the documents are in

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They can be returned before that time if the party applying for such return delivers to the proper officer a certified copy of such document to be substituted for the original.

No document shall be returned which, by force of the decree, has become void or useless.

A receipt to be given for all documents, which have been admitted in evidence, and are returned.

S. 145. The provisions herein contained as to documents shall, so far as may be, apply to all other material objects producible as evidence.

Proof of signature and handwriting of person alleged to have signed or written document produced.

67. If a document is alleged to be signed or to have been written wholly or in part by any person, the signature or the handwriting of so much of the document as is alleged to be in that person's handwriting must be proved to be in his handwriting.

Proof of execution of document required by law to be attested.

68. If a document is required by law to be attested it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence.

Notes.

So far as the Editor has been able to ascertain there are only three kinds of documents which are *required by law to be attested;* wills under S. 50 of Act X of 1865; mortgages of immoveable property where the principal money is one hundred rupees and upwards under S. 59 of Act IV of 1882 and gifts of immoveable property under S. 123 of last named Act.

Proof where no attesting witness found.

69. If no such attesting witness can be found, or if the document purports to have been executed in the United Kingdom, it must be proved that the attestation of one attesting witness at least is in his handwriting, and that the signature of the person executing the document is in the handwriting of that person.

Admission of execution by party to attested document.

70. The admission of a party to an attested document of its execution by himself shall be sufficient proof of its execution as against him, though it be a document required by law to be attested.

Proof when attesting witness denies the execution.

71. If the attesting witness denies or does not recollect the execution of the document, its execution may be proved by other evidence.

Proof of document not required by law to be attested.

72. An attested document, not required by law to be attested, may be proved as if it was unattested.

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Comparison of signature, writing or seal with others admitted or proved.

73. In order to ascertain whether a signature, writing, or seal is that of the person by whom it purports to have been written or made, any signature, writing, or seal admitted or proved to the satisfaction of the Court to have been written or made by that person may be compared with the one which is to be proved, although that signature, or seal has not been produced or proved for any other purpose.

The Court may direct any person present in Court to write any words or figures for the purpose of enabling the Court to compare the words or figures so written with any words or figures alleged to have been written by such person.

Notes.

Where certain ryots swore that they got their pottahs from the hands of the person who professed to sign them, this was *held* under this section as "proving to the satisfaction of the Court" that the signatures were those of the lessor. *Tarapershad Tangee v. Lukhee Narain Panrai and others* (21 W. R., 6).

Public Documents.

Public documents.

74. The following documents are public documents.

(1.) Documents forming the acts, or records of the acts—

(*i*) of the sovereign authority,

(*ii*) of official bodies and tribunals, and

(*iii*) of public officers, legislative, judicial and executive, whether of British India, or of any other part of Her Majesty's dominions, or of a foreign country.

(2.) Public records kept in British India of private documents.

Notes.

Letters between district authorities are public documents forming a record of the acts of the public authorities, and as such admissible as evidence under this section. *Prithee Singh and others v. The Court of Wards* (23 W. R., 272).

Where a suit is compromised and a petition is presented in the usual way, and the Court makes an order confirming the agreement, which with the order as well as the agreement and power-of attorney, are all entered upon record, these papers become as much a part of the record in the suit as if the case had been tried, and judgment given between the parties in the ordinary way; and that record is a public document and may be proved by an office-copy. *Bhagain Megh Ranee Koer v. Gooroopershad Singh* (25 W. R., 68).

A jamabandi prepared by a Deputy Collector while engaged in the settlement of land under Reg. VII of 1822 is a public document within the meaning of this section. *Tara Patur v. Abinash Chunder Dutt* (I. L. R., 4 Cal., 79).

A certificate granted by the Board of Trade is not a public document within the meaning of this section. *In the matter of a collision between the Ava and Brenhilda* (I. L. R., 5 Cal., 568).

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In a suit to obtain possession, under a title acquired by purchase at an auction, of certain lands, together with mesne profits, upon setting aside an alleged taluqa etmami right claimed by the defendants, the defendants, in support of their claim, produced certain documents purporting to be abstracts from or copies of, Government measurement chittas, dated Mughi 1126-27 (1764).

These documents were produced from the Collectorate but there was nothing to show that they were the record of measurements made by any Government officer. *Held* that they were not "public documents" within the meaning of this section. *Nittyanund Roy v. Abdur Raheem and another* (I. L. R., 7 Cal., 76).

Private documents.

75. All other documents are private.

Certified copies of public documents.

76. Every public officer having the custody of a public document which any person has a right to inspect, shall give that person on demand a copy of it on payment of the legal fees therefor together with a certificate written at the foot of such copy that it is a true copy of such document or part thereof, as the case may be, and such certificate shall be dated and subscribed by such officer with his name and his official title and shall be sealed, whenever such officer is authorized by law to make use of a seal; and such copies so certified shall be called certified copies.

Explanation.—Any officer who, by the ordinary course of official duty, is authorized to deliver such copies, shall be deemed to have the custody of such documents within the meaning of this section.

Note.

This section and the next refer to public documents and not to kobalas registered. *Hureehur Moojoomdar and others v. Churn Majhee and others* (22 W. R., 355).

Proof of documents by production of certified copies.

77. Such certified copies may be produced in proof of the contents of the public documents or parts of the public documents of which they purport to be copies.

Note.

See the case cited under the preceding section.

Proof of other official documents.

78. The following public documents may be proved as follows:—

(1) Acts, orders or notifications of the Executive Government of British India in any of its departments, or of any Local Government, or any department of any Local Government,

by the records of the departments, certified by the heads of those departments respectively,

or by any document purporting to be printed by order of any such Government:

(2.) The proceedings of the Legislatures,

by the journals of those bodies respectively, or by published Acts or abstracts or by copies purporting to be printed by order of Government:

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(3.) Proclamations, orders or regulations issued by Her Majesty or by the Privy Council, or by any department of Her Majesty's Government,

by copies or extracts contained in the *London Gazette*, or purporting to be printed by the Queen's Printer:

(4.) The acts of the Executive or the proceedings of the legislature of a foreign country,

by journals published by their authority or commonly received in that country as such, or by a copy certified under the seal of the country or sovereign, or by a recognition thereof in some public Act of the Governor General of India in Council:

(5.) The proceedings of a municipal body in British India,

by a copy of such proceedings, certified by the legal keeper thereof, or by printed books purporting to be published by the authority of such body:

(6.) Public documents of any other class in a foreign country,

by the original, or by a copy certified by the legal keeper thereof with a certificate under the seal of a Notary Public, or of a British Consul or diplomatic agent, that the copy is duly certified by the officer having the legal custody of the original, and upon proof of the character of the document according to the law of the foreign country.

PRESUMPTIONS AS TO DOCUMENTS.

Presumption as to genuineness of certified copies.

79. The Court shall presume every document purporting to be a certificate, certified copy, or other document, which is by law declared to be admissible as evidence of any particular fact, and which purports to be duly certified by any officer in British India, or by any officer in any Native state in alliance with Her Majesty, who is duly authorized thereto by the Governor General in Council, to be genuine: Provided that such document is substantially in the form and purports to be executed in the manner directed by law in that behalf.

The Court shall also presume that any officer by whom any such document purports to be signed or certified held, when he signed it, the official character which he claims in such paper.

Presumption as to documents produced as record of evidence.

80. Whenever any document is produced before any Court, purporting to be a record or memorandum of the evidence, or of any part of the evidence, given by a witness in a judicial proceeding or before any officer authorized by law to take such evidence, or to

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be a statement or confession by any prisoner or accused person, taken in accordance with law, and purporting to be signed by any Judge or Magistrate, or by any such officer as aforesaid, the Court shall presume—

that the document is genuine; that any statements as to the circumstances under which it was taken, purporting to be made by the person signing it, are true, and that such evidence, statement or confession was duly taken.

Notes.

In *Queen v. Nussuruddin and another* (21 W. R. Cr., 5) *Phear, J., Held.* "The confession of Boloo (a witness) could be only used as evidence against the prisoners so far as it existed in the shape of a former deposition made by him as a witness, and then only under the condition prescribed by section 249 of Act X. of 1872. Those conditions are—that it must have been duly taken by the committing Magistrate in the presence of the accused person, that is, the person against whom it is to be used. Now, although a document purporting to be the deposition of Boloo, made before a Magistrate, appears on the record, there is no evidence, as far as we can see, to prove that this document exhibits the evidence of this witness duly taken by the committing Magistrate in the presence of any of the persons who were tried in the Sessions Court and against whom it was used. A certificate is, no doubt appended to it initialed by some person, and on the supposition that this person was a Magistrate that certificate would, under this section, afford *prima facie* evidence of the circumstances mentioned in it relative to the taking of the statement, &c. But this certificate is merely in these words.—"Read to the deponent and admitted correct;" and does not give any of the facts necessary to render a deposition admissible under s. 249 of Act X of 1872. Moreover if it did state these facts, still, in-as-much as Boloo, when examined as a witness in the Sessions Court and asked about this alleged deposition denied that it was the deposition made by him, the presumption allowed by this section could not be made; and it became necessary, in order to render the deposition admissible under s. 249 of Act X of 1872 to show by direct testimony that the conditions of that section had been satisfied"

Act X of 1872.	Act X of 1882.
249. When a witness is produced before the Court of Session or before the High Court in the exercise of its original or appellate criminal jurisdiction, the evidence given by him before the committing Magistrate may, in the discretion of the presiding Judge, be treated as evidence in the case, if it was duly taken in the presence of the accused person. *Explanation.* This section shall not authorise the Court to refer to the record of the evidence given by a witness who is absent, except in the cases in which such evidence may be referred to under the Indian Evidence Act, 1872, or other law in force for the time being upon the subject of evidence.	288. The evidence of a witness duly taken in the presence of the accused before the committing Magistrate may, in the discretion of the presiding Judge, if such witness is produced and examined, be treated as evidence in the case. NB. This section will be found in the Chapter which treats of trials before High Courts and Courts of Session.

In another case, the deposition of the prisoner given in Hindustani but taken in English by the Magistrate and the memorandum at the foot of the deposition that

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it was read to the witness and was by him acknowledged to be correct though *held* not to be quite satisfactory (as the person who took down in English what the prisoner had said in Hindustani was not examined as a witness and the prisoner had no opportunity of cross-examining him) was admitted as a proper deposition within the provisions of Act X of 1872, and the memorandum was taken under this section as evidence of the facts stated in it and as affording some evidence that the translation was correct. *Queen v. Gonouri* (22 W. R., Cr., 2).

Presumption as to Gazettes, newspapers, private Acts of Parliament and other documents.

81. The Court shall presume the genuineness of every document purporting to be the *London Gazette*, or the *Gazette of India*, or the Government Gazette of any Local Government, or of any colony, dependency or possession of the British Crown, or to be a newspaper or journal or to be a copy of a private Act of Parliament printed by the Queen's Printer, and of every document purporting to be a document directed by any law to be kept by any person, if such document is kept substantially in the form required by law and is produced from proper custody.

Note.

Documents are said to be in proper custody if they are in the place in which, and under the care of the person with whom, they would naturally be; but no custody is improper if it is proved to have had a legitimate origin, or if the circumstances of the particular case are such as to render such an origin probable. (See explanation to s. 90).

Presumption as to documents admissible in England without proof of seal or signature.

82. When any document is produced before any Court, purporting to be a document which, by the law in force for the time being in England or Ireland, would be admissible in proof of any particular in any Court of justice in England or Ireland, without proof of the seal or stamp or signature authenticating it, or of the judicial or official character claimed by the person by whom it purports to be signed, the Court shall presume that such seal, stamp or signature is genuine, and that the person signing it held, at the time when he signed it, the judicial or official character which he claims,

and the document shall be admissible for the same purpose for which it would be admissible in England or Ireland.

Presumption as to maps or plans made by authority of Government.

83. The Court shall presume that maps or plans purporting to be made by the authority of Government were so made, and are accurate; but maps or plans for the purposes of any cause must be proved to be accurate.

Notes.

A survey map is a piece of evidence like other evidence and can be of no effect in determining the burden of proof. *Narain Singh Roy v. Nurendronarain Roy* (22 W., R., 296).

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The accuracy of a thakbust map must be presumed under this section. *Niamutoolla Khadim and another v. Himmat Ali Khadim and others* (22 W., R., 519).

See also the case of *Junmajoy Mullick v. Dwarkanath Mytee* (I. L. R., 5 Cal., 287 ; 4 C. L. R., 574) quoted on p. 11 ante.

The fact that a survey map, made by the authority of the Government, has been annulled and superseded by an order of the Board of Revenue, and that a fresh survey has been taken, and a map made in accordance therewith, does not affect the presumption allowed under this section, as to the accuracy of the former survey map. *Juggessur Singh Roy and others v. Byconto Nath Dutt* (6 C. L. R., 519 ; I. L. R., 5 Cal., 822).

Survey officers having no jurisdiction to inquire into questions of title, a survey map is not direct evidence of title in the same way that a decree in a disputed cause is evidence of title, but it is direct evidence of possession at the time of the survey being made. *Nobo Coomar Doss and another v. Gobind Chunder Roy* (9 C. L. R., 305).

Presumption as to collections of laws and reports of decisions.

84. The Court shall presume the genuineness of every book purporting to be printed or published under the authority of the Government of any country, and to contain any of the laws of that country,

and of every book purporting to contain reports of decisions of the Courts of such country.

Presumption as to powers-of-attorney.

85. The Court shall presume that every document purporting to be a power-of-attorney, and to have been executed before, and authenticated by, a Notary Public, or any Court, Judge, Magistrate, British Consul or Vice-Consul, or representative of Her Majesty or of the Government of India, was so executed and authenticated.

Presumption as to certified copies of foreign judicial records.

86. The Court may presume that any document purporting to be a certified copy of any judicial record of any country not forming part of Her Majesty's dominions is genuine and accurate, if the document purports to be certified in any manner which is certified by any representative of Her Majesty or of the Government of India ~~resident~~ in such country to be the manner commonly in use in that country for the certification of copies of judicial records. * Added see to the left

Presumption as to books, maps and charts.

87. The Court may presume that any book to which it may refer for information on matters of public or general interest, and that any published map or chart, the statements of which are relevant facts, and which is produced for its inspection, was written and published by the person, and at the time and place, by whom or at which it purports to have been written or published.

Presumption as to telegraphic messages.

88. The Court may presume that a message, forwarded from a telegraph office to the person to whom such message purports to be addressed, corres-

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ponds with a message delivered for transmission at the office from which the message purports to be sent ; but the Court shall not make any presumption as to the person by whom such message was delivered for transmission.

Presumption as to due execution &c. of documents not produced.

89. The Court shall presume that every document, called for and not produced after notice to produce, was attested, stamped and executed in the manner required by law.

Presumption as to documents thirty years old.

90. Where any document, purporting or proved to be thirty years old, is produced from any custody which the Court in the particular case considers proper, the Court may presume that the signature and every other part of such document, which purports to be in the handwriting, of any particular person, is in that person's handwriting, and, in the case of a document executed or attested, that it was duly executed and attested by the persons by whom it purports to be executed and attested.

Explanation.—Documents are said to be in proper custody if they are in the place in which, and under the care of the person with whom, they would naturally be ; but no custody is improper if it is proved to have had a legitimate origin, or if the circumstances of the particular case are such as to render such an origin probable.

This explanation applies also to section eighty-one.

Illustrations.

(*a.*) A has been in possession of landed property for a long time. He produces from his custody deeds relating to the land showing his titles to it. The custody is proper.

(*b.*) A produces deeds relating to landed property of which he is the mortgagee. The mortgagor is in possession. The custody is proper.

(*c.*) A, a connection of B, produces deeds relating to lands in B's possession, which were deposited with him by B for safe custody. The custody is proper.

Notes.

Should any reader be desirous of learning what was the law before this section came into force, he will find it laid down in the following cases :—4 W. R., P. C., 73 ; 6 W. R., 82 ; 10 W. R., 1, 237 ; 11 W. R., P. C., 35 ; 12 W. R., 90, 197, 472 ; 13 W. R., 109 ; 17 W. R., 279, 346 ; 18 W. R., 314, 385 ; 21 W. R., 19, P. C., 22, 130, 279.

Where a document purported to be 45 years old, and a mohurrir swore to its having been in his custody as keeper of plaintiff's records for the time of his service *viz* : for the last 15 years, the evidence was *held* to show (if credible) that the document had come from the proper custody within the meaning of this section and to

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require no direct evidence of its genuineness. *Ekcowree Singh and others v. Kylash Chunder Mookerjee* (21 W. R., 45).

A document more than 30 years old, although not requiring to be formally attested by the witnesses who attended at its execution, must be shown to have come from the custody of the person, who would have been the proper person to keep it. *Thakoorpershad v. Mussamat Bashmutty Kooer.* (24 W. R., 428).

In a suit for recovery of lands claimed partly in virtue of rights obtained under a kobala and partly in virtue of rights purchased at a sale in execution of a decree, in which the Lower Appellate Court refused to recognise a statement made before a Collector and recorded in the course of a mutation proceeding as a "document" under this Act: *Held* by the High Court that a statement made before a Collector and recorded by him as evidence in a mutation proceeding is a document entitled to be received as evidence under this section. *Budree Lall vs. Bhoosee Khan* (25 W. R., 134).

See also the case of *Khetter Chunder Mookerjea v. Khetter Paul Sreeterutno* (I. L. R., 5 Cal., 886; 6 C.L.R., 199), cited under s. 65 (ante p. 55.)

In applying the presumption allowed by this section, the period of 30 years is to be reckoned, not from the date upon which the document is filed in Court, but from the date on which, it having been tendered in evidence, its genuineness or otherwise becomes the subject of proof—e. g. The pottah on which the plaintiffs relied was filed with the plaint on the 10th February 1877, it was not thirty years old *then*; but, when the suit was heard on the 30th July following, it was 30 years old. *Minu Sirkar v. Rhedoynath Roy and others* (5 C. L. R., 135).

The plaintiffs sued the defendants for enhancement of rent. The defendants resisted the claim, relying, *inter alia*, on a mokurrari pottah executed 9th October 1832. This pottah purported to bear the seal of one of the then maliks of the lands, and also purported to be signed on behalf of all the maliks by A. *Held* that, although the pottah might be an authentic document, it would not bind the maliks who did not affix their seals, nor those who claimed under them, unless it was shown that A had a special authority to sign the names of such maliks to it or a general authority to sign on their behalf documents of the same description as the pottah, and that until such proof was given, the document was not admissible in evidence. *Held* further, the fact that the pottah was more than 30 years old gave rise to the presumption that the signature at the foot of it was in the handwriting of A, and that the pottah was executed by him; but that to make it evidence against the representatives of the maliks who had not executed it, the defendants should show that A had authority to sign their names. *Ubilack Rai and others v. Dallial Rai and others* (I. L. R. 3 Cal., 557).

No legal presumption can arise as to the genuineness of a document more than 30 years old, merely upon proof that it was produced from the records of a Court in which it had been filed at some time previous. It must be shown that the document had been so filed in order to the adjudication of some question of which that Court had cognizance, and which had come under the cognizance of such Court. *Gudadhur Paul Chowdhry and others v. Bhyrub Chunder Bhuttcharji and another.* I. L. R., 5 Cal., 918).

A Court is not *bound* to accept as genuine and valid a document upwards of 30 years old, even though it be produced from proper custody. Before accepting such document as proof of title, the Court must satisfy itself that the person who purports to have affixed his signature to the document was a person who at that time was entitled to grant such a document. *Uggra Kant Chowdhry and others v. Hurro Chunder Shickdar and others* (I. L. R., 6 Cal. 209).

Although ancient documents are admissible in evidence on proof that they have been produced from proper custody, their value as evidence when admitted must depend in each case upon the corroboration derivable from external circumstances, e. g. from the documents having been produced on previous occasions upon which they would naturally have been produced, if in existence at the time, or from acts having been done under them. *Roikunt Nath Kundu and another v. Lukhun Majhi and others* (9 C. L. R., 425).

See also the cases of *Jaker Ali Chowdhry v. Raj Chunder Sen*; *Taher Ali Chowdhry v. Aukhil chunder Sen* (10 C. L. R., 469) cited under s. 57 (ante p. 51).

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CHAPTER VI.

OF THE EXCLUSION OF ORAL BY DOCUMENTARY EVIDENCE.

Evidence of terms of contracts, grants and other dispositions of property reduced to form of document.

91. When the terms of a contract, or of a grant, or of any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property, or of such matter, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained.

Exception 1.—When a public officer is required by law to be appointed in writing, and when it is shown that any particular person has acted as such officer, the writing by which he is appointed need not be proved.

Exception 2.—Wills *admitted to probate in British India* may be proved by the probate.

Explanation 1.—This section applies equally to cases in which the contracts, grants or dispositions of property, referred to are contained in one document, and to cases in which they are contained in more documents than one.

Explanation 2.—Where there are more originals than one, one original only need be proved.

Explanation 3.—The statement, in any document whatever, of a fact other than the facts referred to in this section, shall not preclude the admission of oral evidence as to the same fact.

Illustrations.

(*a.*) If a contract be contained in several letters, all the letters in which it is contained must be proved.

(*b.*) If a contract is contained in a bill of exchange, the bill of exchange must be proved.

(*c.*) If a bill of exchange is drawn in a set of three, one only need be proved.

(*d.*) A contracts, in writing, with B, for the delivery of indigo upon certain terms. The contract mentions the fact that B had paid A the price of other indigo contracted for verbally on another occasion.

Oral evidence is offered that no payment was made for the other indigo.

The evidence is admissible.

(*e.*) A gives B receipt for money paid by B.

Oral evidence is offered of the payment.

The evidence is admissible.

Notes.

The words in italics were substituted for "under the Indian Succession Act" by s. 7 of Act XVIII of 1872.

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The following are cases in which matters are required by law to be reduced to the form of a document.

The depositions of witnesses in civil cases (see sections 182, 184, 185, 186, 187, 189, and 190 of Act XIV of 1882.)

The depositions of witnesses in criminal cases (see section 353, 354, 355, 356, 357, 358, 359, and 360 of Act X of1882.)

Judgments decrees and sentences.

Wills under the Acts X of 1865 and XXI of 1870 ; but nothing in this chapter contained must be taken to affect the provisions of Act X of 1865 as to the construction of wills (vide s. 100 post).

Contracts under s. 25 clauses 1 and 3 of Act IX of 1872.

Acknowledgments of liability under s. 19 of Act XV of 1877.

Sales and exchanges of tangible immoveable property of value of one hundred rupees and upwards and of a reversion or other intangible thing (sections 54 and 118 of Act IV of 1882).

Mortgages where the principal money secured is one hundred rupees or upwards (s. 59 of the last mentioned Act).

Leases of immoveable property from year to year, or for any term exceeding one year or reserving a yearly rent (s. 107 of the same Act).

Gifts of immoveable property (s. 123 of the same Act).

In a case of giving false evidence the English record written by the Magistrate was put in to prove what the accused had stated before him. The document was not interpreted to the accused in the language in which it was given, or which he understood ; nor was it read over in accordance with the requirements of s. 339 of Act X of 1872 in the presence of the person then accused : *Held*, that the English record of the Magistrate was not legal evidence under this section of what the prisoner said before the Magistrate. *Queen v. Mungull Dass* (23 W. R., Cr., 28).

ACT X OF 1872.	*ACT X OF* 1882.
339. As the evidence of each witness taken under s. 334, is completed it shall be read over to the witness in the presence of the accused person, if in attendance or of his agent when his personal attendance is dispensed with and he appears by agent, and shall if necessary be corrected. If the witness deny the correctness of the evidence when the same is read over to him, the Magistrate or Sessions Judge may, instead of correcting the evidence, make a memorandum of the objection made to it by the witness, and shall add such remarks as he thinks necessary. If the evidence be taken down in a language different from that in which it has been given, and the witness does not understand the language in which it is taken down the witness may require his evidence, as taken down, to be interpreted to him in the language in which it was given or in a language which he understands.	360. As the evidence of each witness taken under s. 356 or s. 357 is completed, it shall be read over to him in the presence of the accused, if in attendance, or of his pleader, if he appears by pleader, and shall if necessary be corrected. If the witness deny the correctness of any part of the evidence when the same is read over to him, the Magistrate or Sessions Judge, may instead of correcting the evidence make a memorandum thereon of the objection made to it by the witness and shall add such remarks as he thinks necessary. If the evidence be taken down in a language different from that in which it has been given and the witness does not understand the language in which it is taken down, the evidence so taken down *shall* be interpreted to him in the language in which it was given, or in a language which he understands. *N. B.*—The change made is noteworthy. The *Court* is now *bound* to interpret the evidence to the witness in the language in which it was given or in a language which

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he understands whether the witness requires it or not. The *law* requires it.

Failure to comply with the provisions of sections 182 and 183 of Act X of 1877 in a judicial proceeding, is an informality which renders the deposition of a witness inadmissible in evidence on a charge laid against him of giving false evidence based on such deposition; and under this section no other evidence of such deposition is admissible. *Empress v. Mayadeb Gossami* (I. L. R., 6 Cal., 762; 8 C. L. R., 292).

See also the case of *Reg. v. Bai Ratan* (10 Bom H. C. R., 166) quoted in the notes to s. 24 (ante p. 18).

Where the *contents* of a pottah are in any way in question, it is necessary to prove them by the production of the document; where this is *not* the case, oral evidence of the pottah is admissible. *Kedarnath Joardar and others v. Shurfoonnissa Bibee* (24 W. R., 425).

Section 119 of the Code of Criminal Procedure not making it obligatory upon a police officer to reduce to writing any statements made to him during an investigation, neither that, nor this section render oral evidence of such statements inadmissible. If the statements be actually reduced to writing, the writing itself cannot be treated as part of the record or used as evidence, but may be used for the purpose of refreshing memory under section 159 of this Act. Consequently, the person making the statements may properly be questioned about them; and, with a view to impeach his credit, the Police officer himself, or any other person in whose hearing the statements were made, can be examined on the point under section 155 of this Act. *Queen vs. Uttamchand Kapurchand and others* (11 Bom. H. C. R., 120).

Receipts for sums paid in part liquidation of a bond hypothecating immoveable property must be registered under the provisions of s. 17 of Act VIII of 1871, to render them admissible as evidence under s. 49 of that Act. Under illustration(e) of this section, such payments may nevertheless be proved by parol evidence, which is not excluded owing to the inadmissibility of the documentary evidence. *Dalip Sing v. Durgaprashad* (I. L. R., 1 All., 442).

The document called a Sodi Razinama (whereby a party relinquishes his right of occupancy of land in his possession to his landlord, and requests the latter to register the land in the name of another party to whom it has been sold) is not a document of the kind mentioned in this section and therefore does not exclude the Courts from basing their findings upon other evidence, should any such exist. *Venkatesa v. Sengoda* (I. L. R., 2 Mad., 117).

In 1876 accounts were stated between B and D, and a balance of Rs 800 was found to be due from D to B. D gave B an instrument whereby he agreed to pay the amount of such balance in four annual instalments of Rs 200. B at the same time noted in his account book that such balance was "payable in four instalments of Rs 200 yearly." In July, 1879, B sued D upon such instrument for the balance of the first instalment. The Court trying this suit refused to receive such instrument in evidence on the ground that it was a promissory note and as such was improperly stamped. Thereupon B applied for and obtained permission to withdraw the suit with liberty to bring a fresh one for the original debt. In October, 1879, B again sued D, claiming the balance of the first and second instalments, basing his claim upon the note made by him in his account book. He obtained a decree in this suit for the amount claimed by him. In 1880 B again sued D, claiming the amount of the third instalment, again basing his claim upon such note.

Held, by the Court that the agreement by D to pay the balance found due from him to B on account stated between them in instalments of Rs. 200 annually could not be proved by the note made by B in his account-book but could only be proved by the promissory note. *Benarsi Das v. Bhikhan Das* (I. L. R., 3 All., 717)

A deed of partition was executed among three brothers C, N, and B, on the 19th March 1867 but was not registered. It recited that, some years previously to its date, a division of the family property, with the exception of three houses, had been effected, and it purported to divide these houses among the brothers. In a suit brought by C's widow for the recovery of the house which fell to C's share,

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Held that, although the deed did not exclude secondary evidence of the partition of the family property previously divided, yet it affected to dispose of the three houses by way of partition made on the day of its execution, and therefore, secondary evidence of its contents was inadmissible under this section. *Kachubhai Bin Gulab Chand and another v. Krishnabhai Kom Babaji* (I. L. R., 2 Bom., 635).

A offered to purchase certain property for Rs. 14,000 and to pay Rs. 1,000 as earnest money. His offer was accepted, the Rs. 1,000 were paid as earnest money and an ordinary receipt for the same granted by B's solicitors. B subsequently sold that property to other persons and A brought a suit for specific performance. It was *held* by a Full Bench of the Bombay High Court that that receipt fell within cl. (3) of s., 17 of Act VIII of 1871 and required registration and without registration was inadmissible in evidence; but that oral evidence of the payment was admissible under *illustration* (*e*) to this section. That cl. (3) of s. 17 of the Registration Act included within its scope a payment of a part of the consideration money as well as a payment of the whole of it. *Waman Ram Chundra and others v. Dhondiba Krishnaji* (I. L. R., 4 Bom., 122).

H lent Rs. 85 to D on a pledge of moveable property. D repaid H Rs. 40; and at the time of the repayment acknowledged orally that the balance of the debt, Rs. 45, was still due by him. It was agreed between the parties at the same time that D should give H a promissory note for such balance, and that such property should be returned to him. Accordingly D gave H a promissory note for Rs. 45, and the property was returned to him. H subsequently sued D on such oral acknowledgment for Rs. 45 ignoring the promissory note, which being insufficiently stamped was not admissible in evidence. *Held* that the existence of the promissory note did not debar H from resorting to his original consideration nor exclude evidence of the oral acknowledgment of the debt. *Hira Lall v. Datadin* (I. L. R., 4 All., 135).

Exclusion of evidence of oral agreement.

92. When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to the last section, no evidence of any oral agreement or statement shall be admitted, as between the parties to any such instrument or their representatives in interest, for the purpose of contradicting, varying, adding to, or subtracting from, its terms:

Proviso (1).—Any fact may be proved which would invalidate any document, or which would entitle any person to any decree or order relating thereto; such as fraud, intimidation, illegality, want of capacity in any contracting party want *or* failure of consideration, or mistake in fact or law.

Proviso (2).—The existence of any separate oral agreement as to any matter on which a document is silent, and which is not inconsistent with its terms, may be proved. In considering whether or not this proviso applies, the Court shall have regard to the degree of formality of the document.

Proviso (3).—The existence of any separate oral agreement, constituting a condition precedent to the attaching of any obligation under such contract, grant or disposition of property, may be proved.

Proviso (4).—The existence of any distinct subsequent oral agreement to rescind or modify any such contract, grant or dis-

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position of property, may be proved, except in cases in which such contract, grant or disposition of property is by law required to be in writing or has been registered according to the law in force for the time being as to the registration of documents.

Proviso (5).—Any usage or custom by which incidents not expressly mentioned in any contract are usually annexed to contracts of that description, may be proved; Provided that the annexing of such incident would not be repugnant to, or inconsistent with, the express terms of the contract.

Proviso (6).—Any fact may be proved which shows in what manner the language of a document is related to existing facts.

Illustrations.

(*a.*) A policy of insurance is effected on goods "in ships from Calcutta to London." The goods are shipped in a particular ship which is lost. The fact that that particular ship was orally excepted from the policy, cannot be proved.

(*b.*) A agrees absolutely in writing to pay B Rs. 1,000 on the first March 1873. The fact that, at the same time an oral agreement was made that the money should not be paid till the thirty-first March, cannot be proved.

(*c.*) An estate called 'the Rampur tea estate' is sold by a deed which contains a map of the property sold. The fact that land not included in the map had always been regarded as part of the estate and was meant to pass by the deed, cannot be proved.

(*d.*) A enters into a written contract with B to work certain mines, the property of B, upon certain terms. A was induced to do so by a misrepresentation of B's as to their value. This fact may be proved.

(*e.*) A institutes a suit against B for the specific performance of a contract, and also prays that the contract may be reformed as to one of its provisions, as that provision was inserted in it by mistake. A may prove that such a mistake was made as would by law entitle him to have the contract reformed.

(*f.*) A orders goods of B by a letter in which nothing is said as to the time of payment, and accepts the goods on delivery. B sues A for the price. A may show that the goods were supplied on credit for a term still unexpired.

(*g.*) A sells B a horse and verbally warrants him sound. A gives B a paper in these words: 'Bought of A a horse for Rs. 500.' B may prove the verbal warranty.

(*h.*) A hires lodgings of B, and gives B a card on which is written 'Rooms, Rs. 200 a month.' A may prove a verbal agreement that these terms were to include partial board.

A hires lodgings of B, for a year, and a regularly stamped agreement, drawn up by an attorney, is made between them. It is silent on the subject of board. A may not prove that board was included in the terms verbally.

(*i.*) A applies to B for a debt due to A by sending a receipt for the money. B keeps the receipt and does not send the money. In a suit for the amount, A may prove this.

(*j.*) A and B make a contract in writing to take effect upon the happening of a certain contingency. The writing is left with B, who sues A upon it. A may show the circumstances under which it was delivered.

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Notes.

The word in italics in proviso (1) was substituted for "of" by s. 8 of Act XVIII of 1872.

If any student is curious to ascertain the changes made in the law of evidence by this section, he is referred to the following decisions:—5 W. R., F. B., 68; 6 W. R., 111; 7 W. R., 334; 8 W. R., 339; 9 W. R., 251; 11 W. R., 450; 14 W. R., 319; 18 W. R., 256; and 19 W. R., 333.

The following are the decisions upon this section.

Under this section, no oral evidence of any oral agreement is admissible to vary the terms of a *kobala*, which is on the face of it an unconditional sale. *Ram Doolal Sen v. Radha Nath Sen* (23 W. R.,167).

Banapa and Shetapa owed Venkan Bhat Rs. 1000. Haridas, the plaintiff Sundardass s brother, agreed to pay that sum to Venkan Bhat. Banapa and Shetapa executed a deed of sale of their property (mentioned therein) in favour of Haridas in lieu of the sum of Rs 1000; which they thus owed him, and gave him possession of the property. After Haridas's death his brother sued for possession and the defendants set up a contemporaneous oral agreement that they were to repay to Haridas that sum with Rs. 80 for his trouble, by yearly instalments of Rs. 125, and that they passed the deed of sale as a security for the repayment of the said amount of which they had already repaid Rs 821 and had to pay only the balance remaining due; and that, under these circumstances, the deed must not be considered as a sale but merely as a security for the repayment of money. It was *held* in Special Appeal that, as the alleged agreement was wholly inconsistent with the terms of the deed of sale, evidence to prove such agreement was excluded by this section. *Banapa and another vs. Sundar Das Jayjivan Das* (I. L. R., 1 Bom., 333).

This section prevents the admission of oral evidence for the purpose of contradicting or varying the terms of a contract, but does not prevent a party to a contract from showing that there was no consideration, or that the consideration was different from that described in the contract. Where, therefore, a deed of sale described the consideration to be Rs 100 in ready cash received, but the evidence showed that the consideration was an old bond for Rs 63-12-0 and Rs 36-4-0 in cash, *Held* that there was no real variance between the statement in the deed and the evidence as to consideration, having regard to the fact that it is customary in India, when a bond is given wholly or partially in consideration of an existing debt, to describe the consideration as being "ready money received". *Hukumchand v. Hiralall* (I. L. R., 3 Bom., 159).

Evidence cannot be admitted to prove a contemporaneous oral stipulation varying, adding to or subtracting from the terms of a written contract. Evidence of the acts and conduct of the parties to a written contract is not admissible if tendered solely in support of an oral stipulation varying its terms. *Daimodee Paik v. Kaim Taridar and others* (I. L. R., 5 Cal., 300; 4 C.L. R., 419).

The case of *Bakshu Lakshman v. Govinda Kanji and another*, (I. L. R., Bom., (594) which was decided by *Melvill, J.*, is interesting. The facts were the following:—The Plaintiff sued to recover possession of two houses and some lands which he alleged Defendants Nos. 1 and 2, had sold and conveyed to him by a deed of sale dated the 6th August 1874, but some of which he alleged they had sold to Defendants Nos. 3 and 4 who were in possession of them.

Defendants Nos. 1 and 2 contended (*inter alia*) that the Plaintiff had induced them to execute the deed of sale; that the original understanding between the Plaintiff and themselves was that the Plaintiff should hold the properties as security for the sums advanced by him and, that the plaintiff gave a written agreement to the defendants by which he undertook to pay to the defendants Rs. 200 a year penalty in the event of his failing to observe the agreement; that in further pursuance of the said understanding and agreement, the plaintiff did not take possession of any part of the properties in question till June 1876, when an account was made up between them and the plaintiff, and, in accordance with the settlement then arrived at, the said defendants made over to the plaintiff temporary possession of certain of the properties

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in full satisfaction of the balance due to the plaintiff.

Defendants Nos. 3 and 4 set up their ownership.

The counter-agreement set up by the defendants being unregistered was inadmissible in evidence.

The cases of *Banapa v. Sundar Das and Daimodee Paik v. Kaim Taridar* before mentioned were cited in the course of argument. *Melvill, J., held* that a party, whether plaintiff or defendant, who sets up a contemporaneous oral agreement as showing that an apparent sale was really a mortgage, should not be permitted to start his case by offering direct parol evidence of such oral agreement; but if it appear, clearly and unmistakeably, from the conduct of the parties, that the transaction has been treated by them as a mortgage, the Court will give effect to it as a mortgage and not as a sale, and therefore if it be necessary to ascertain what were the terms of the mortgage, the Court will for that purpose allow parol evidence to be given of the original oral agreemeut.

Daimodee Paik v. Kaim Taridar (cited above) dissented from and the F. B. ruling in 5 W. R., 68 followed.

Although parol evidence will not be admitted to prove directly that simultaneously with the execution of a deed of sale there was an oral agreement by way of defeasance, yet the Court will look to the subsequent conduct of the parties and if it clearly appears from such conduct that the apparent vendee treated the transaction as one of mortgage, the Court will give effect to it as a mortgage and nothing more.

It is a mistake to reject evidence of the conduct of parties to a written contract on the ground that it is only an indication of an unexpressed unwritten contract between them. Conduct is, no doubt, evidence of the agreement out of which it arose; but it may be very much more. In many cases it may amount to an estoppel. In such a case it is clear that evidence of conduct would be strictly admissible under Sec. 115 and even when conduct falls short of a legal estoppel, there is nothing in the Evidence Act which prevents it from being taken into consideration.

Courts of Equity in England will always allow a party (whether plaintiff or defendant) to show that an assignment of an estate, which is, on the face of it, an absolute conveyance, was intended to be nothing more than a security for debt, and they will not only look to the conduct of the parties, but will admit mere parol evidence to show or explain the real intention and purpose of the parties at the time. The exercise of this remedial jurisdiction is justified on two grounds *viz.* part-performance and fraud.

The Courts in India are not precluded by the Indian Evidence Act from exercising a similar jurisdiction. The rule, of estoppel, as laid down in section 115, covers the whole ground covered by the theory of part-performance. That section does not say that, in order to constitute an estoppel, the acts, which a person has been induced to do, must have been prejudicial to his own interest. The terms are sufficiently wide to meet the case of a grantor who has simply been allowed to remain in possesion, on the understanding and belief that the transaction was one of mortgage and thus every instance of what the English Courts call part-performance would be brought within the Indian rule of estoppel. But the ground upon which this jurisdiction of the Courts in India may, most safely, be rested, is the obligation which lies on them to prevent fraud. The Courts will not allow a rule or even a statute, which was passed to suppress fraud, to be the most effectual encouragement to it, and accordingly, in England, the Courts, for the purpose of preventing fraud, have even in some cases set aside the common law rules of evidence and the Statute of Frauds. The Courts in India have the same justification in dealing similarly with the obstacles interposed by the Indian Evidence Act. In thus modifying the rules laid down by this section and the preceding one, the Courts will not be acting in opposition to the intention of the Legislature, which by enacting the provisions of s. 26 cl. (c) of the Specific Relief Act, has shown an intention to relax the rules of the Indian Evidence Act so as to bring them into conformity with the practice of the English Courts of Chancery.

Section 26, cl. (c) of the Specific Relief Act is as follows:—

"Where a plaintiff seeks specific performance of a contract in writing, to which the defendant sets up a variation, the plaintiff cannot obtain the performance sought, except with the variation so set up, in the following cases *(inter alia)*:—

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(*c*) where the defendant, knowing the terms of the contract and understanding its effect, has entered into it relying upon some misrepresentation by the plaintiff or *upon some stipulation on the plaintiff's part, which adds to the contract, but which he refuses to fulfil.*

The words in italics *Pontifex, J. J.*, in the case of *Cutts v. Brown* (I .L. R., 6 Cal., 336), understood to mean some condition in favour of the defendant agreed to by the plaintiff which he refuses to fulfil.

In the case of *Hasha Khand v. Jesha Premaji*, printed in the foot note (I. L. R., 4 Bom., 609). *Westropp, C. J.*, and *Melvill, J.*, *held*, "In such cases as the present, where one party alleges a transaction to be a mortgage and the other alleges it to be a sale the question which presents itself for consideration is, whether or not there continued to be a debt from the latter to the former."

The case of *Cutts v. Brown*, to which passing allusion has already been made, should be read side by side with the foregoing decisions of the Bombay High Court. In that case the plaintiffs sued for specific performance of an agreement in writing, which set forth, *inter alia*, that the defendants had agreed to sell, &c., "under certain conditions as agreed upon." Only one defendant appeared and stated that he and his wife had agreed to sell the share in the house to the plaintiffs subject to certain terms and conditions as agreed to between them for the sum of Rs. 6200. Those terms were that upon the execution of the conveyance of the share by the defendants in favour of the plaintiffs, the plaintiffs should execute a lease of the share in favour of the defendants for the period of three years at the yearly rent of Rs. 720 ; that the defendants should remain in occupation of the share for the period mentioned ; and that, at the expiration thereof, the plaintiffs should sell back the share to the defendants for the same sum of Rs. 6,200, if they wished them to do so. The reason, why these conditions were agreed upon, was the first defendant stated that he and his wife had no intention to sell the share, but only to mortgage it ; that they were advised that they had no power to mortgage ; and that therefore the sale, lease and repurchase were arranged. He also stated the agreement to sell the one fourth share for Rs. 5000 and that the terms and conditions mentioned had not been performed and contended that the plaintiffs were not entitled to specific performance of the agreement without themselves carrying out their part of the contract, *Held* that parol evidence was admissible to show what was meant by the clause "certain conditions as agreed upon" *Pontifex, J., held* that the agreement set up in the written statement fell within proviso (1) of this section. For if the plaintiffs really agreed verbally to the conditions alleged by the defendants it would be a fraud on their part to insist on performance of the written agreement without at the same time securing to the defendants the performance of the other conditions which they had promised. He also thought that, according to the authorities, the agreement set up in the written statement fell within proviso (2) of this section ; that, if true, the oral agreements alleged are separate to and not inconsistent with the terms of the written agreement, just in the same way, as he thought, it would be still open to prove that what is ostensibly a conveyance was in fact intended to be a mortgage. Moreover it is of the essence of specific performance that, except under special circumstances, part only of an agreement ought not to be decreed to be performed. The 17th section of the Specific Relief Act recognised this principle ; and the 22nd section gives the Court complete discretion. Indeed the 26th section of that Act was in his opinion enacted to meet this very case, which, as he read it, fell within Cl. (c) of that section. *Garth, C. J., held* that the defendant ought to be allowed to show if he can that the words in the contract "under certain conditions" refer to conditions outside the contract, and not to those contained in it. There was nothing in the contract itself to show that the conditions so referred to are those which are mentioned in it, and if the conditions were in fact made orally and the contract was expressly made subject to those conditions, it seemed clear to him that they were not inconsistent with it. It was not necessary that the whole agreement should be in writing; and if, upon the face of that part of it which was in writing, it appeared that there were other conditions, oral or otherwise, which go to make up the entire contract, there is no reason why those conditions if made orally should not be orally proved. The rule laid down in this section applies only where, upon the face of it, the written contract appears to contain the whole contract. He agreed with *Pontifex, J.*, that

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s. 26 of the Specific Relief Act was intended to provide for just such a case as the present. He thought that proviso (1) of this section was not intended to apply to a case where the contract itself being valid, one of the parties wished to make an improper use of it; and lastly that proviso (2) of this section did not apply to this case, because the additional terms did vary and were inconsistent with the principal contract.

S. 17 of the Specific Relief Act enacts "The Court shall not direct the specific performance of a part of a contract except in cases coming under one or other of the three last preceding sections" (14, 15, and 16).

S. 22 of the Specific Relief Act gives the Court a discretion (sound and reasonable, guided by judicial principles and capable of correction by a Court of Appeal) *not* to decree specific performance in the cases following.

I. Where the circumstances under which the contract is made are such as to give the plaintiff an unfair advantage over the defendant, though there may be no fraud or mis-representation on the plaintiff's part.

II. Where the performance of the contract would involve some hardship on the defendant which he did not foresee, whereas its non-performance would involve no such hardship on the plaintiff.

It also gives the Court a discretion to decree specific performance

Where the plaintiff has done substantial acts or suffered losses in consequence of a contract capable of specific performance.

In the case of *Soopromonian Setty and others v. F. W. Heilgers and others* (I. L. R., 5 Cal., 71; 4 C. L. R., 377) *Wilson, J.*, was inclined to think that cl. 2 of s. 230 of the Contract Act must be read subject to this section of the Evidence Act, and that if, on the face of a written contract, an agent appears to be personally liable, he could not escape liability by any disclosure of his principal's name apart from the document.

In a suit upon a kistbundi bond the defendants pleaded that the debt had been liquidated from the usufruct of certain property which, by an oral agreement entered into at the time of the execution of the bond, had been assigned by them to the plaintiffs for that purpose. The assignment having been proved, the Court of first instance, without further enquiry dismissed the plaintiff's suit. The District Judge, however, reversed the order of that Court, on the ground that under this section, evidence of the alleged oral agreement was inadmissible, it being a contemporaneous agreement, varying and to some extent contradicting the terms of the kistbundi bond. On appeal it was *held* that the allegation of the defendants amounted merely to a plea of payment, and that this section was not a bar to an enquiry as to the foundation of such a plea; and the case was accordingly remanded for an enquiry to be made as to whether the whole or any portion of the kistbundi money had been liquidated from the profits of the lands assigned. *Govindproshad Roy Chowdhry and others v. Anunda Chunder Chowdhry and others* (4 C. L. R., 274.)

In a suit upon a hath chitta the Court having regard to the informal nature of the document sued upon, allowed evidence to be given of a verbal agreement to repay the amount acknowledged with interest, no mention having been made as to interest in the hath chitta itself. *Umeak Chunder Baneya v. Mohini Mohun Das* 9 C. L. R., 301.)

In the years 1870 and 1873 A drew certain bills of exchange upon B, which were accepted by B, for the accommodation of A, and endorsed by A to the Bank of Bengal. In May 1876, A by letter agreed to execute a mortgage of a certain portion of his property, consisting of a share in a Privy Council decree, to B; and in the interval to hold such property at the disposal of B, his successors and assigns. In the month of June 1876, A became unable to meet his liabilities, and, in the month of August following, executed a conveyance of all his property to the Official Trustee upon trust for the benefit of A's creditors. The Bank assented to and executed this deed after it had been assented to and executed by some of the other creditors. The deed did not contain any composition with or release by the creditors, nor any covenant on their part not to sue A. In a suit by the Bank against B as acceptor of the bills, *held* that B was not precluded by the provisions of section 132 of the Contract Act and this section from pleading that he was an accommodation acceptor only. *M. Pogose v. The Bank of Bengal* (I. L. R., 3 Cal., 174.)

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M, the manager of an Indigo Concern appointed under s. 243, Act VIII of 1859, by a deed dated the 1st February 1873, in which the owners of the Concern joined, which was duly registered and made with the Court's sanction, mortgaged the concern, and pledged and assigned the season's crop to A and B, who were pardanashins to secure repayment of a large sum of money, consisting partly of the balance of previous loans from the husband of A and B, and partly of a new loan to the extent of what was described in the deed as the estimated outlay of the season. The deed provided that A and B should have a first charge on the Indigo to be manufactured in the season in respect of the moneys secured thereby; that the Indigo should be sold subject to A's and B's direction; that, until the debt was paid, M should have no power to transfer, sell or mortgage the properties thereby mortgaged, pledged and assigned, or in way to deal with the sale proceeds of the manufactured indigo; and that A and B should have full power to arrange for the appointment and dismissal of the servants of the concern, and for its better management. Previously to this, namely in October 1872, M had, in pursuance of his letter of appointment, filed an estimate for the season's outlay, largely exceeding the sum mentioned in the deed as the estimated outlay, and alleged that, at the time of executing the mortgage deed, he had informed C, who was the general manager of A and B, and, as such was the only medium of communication between M and A and B, that further advances would be necessary. According to M's account, C told him that A and B were unable to make further advances and that he could, if they were needed, obtain them on the usual terms from the plaintiffs, who were indigo-brokers. In previous years, during the lifetime of the husband of A and B, who had held similar mortgages of the concern and of the crop in those years to secure advances made by him, such advances had, with the mortgagee's knowledge, been supplemented by loans obtained from the plaintiffs on the security of a first charge upon the crop to the extent of such loans. And it was alleged by M that it was, upon the understanding that the same course was to be followed in the present instance, that the mortgage deed to A and B was executed.

The moneys advanced by the latter were wholly expended by April, when M, without communicating with A and B, and with only the verbal sanctions of the Court, applied to the plaintiffs for money, and on the 26th April, the plaintiffs wrote to M, that they would make advances to the extent of Rs. 50,000 upon his assigning to them and giving them a first charge on the first 250 maunds of indigo to be manufactured in the season, and they enclosed a form of assignment for M's signature, which he duly signed and returned to the plaintiffs on the 3rd May. In September and October, M obtained further advances from the plaintiffs in respect of other indigo, giving them similar letters of assignment, of the moneys thus advanced by the plaintiffs Rs. 5,000 was paid to C for A and B, by a bill drawn upon the plaintiffs, about Rs. 7,000 was applied towards the expenditure of the following season, and the remainder was applied in the production of the then season's indigo, and M stated that without it he could not have manufactured any indigo whatever that season. The indigo, when manufactured, was claimed by A and B under their mortgage, and their claim being resisted by M, who set up against them the plaintiff's rights under the letters of assignment, A and B brought a suit to enforce the provisions of their mortgage deed. In this suit the indigo was attached before judgment and sent to Calcutta for sale. The plaintiffs now sued A, B and M and the holders of the sale proceeds to establish their first charge in respect of their advances to M upon 360 maunds of the indigo on the strength of their letters of assignment, *Held* per *Garth, C. J., Phear and Macpherson, J. J.*, that the alleged oral agreement between C and M as to obtaining loans, if necessary, from the plaintiffs and giving them a first charge on the season's Indigo in respect of such loans was in direct contravention and defeasance of the mortgage deed to A and B, and was, therefore, inadmissible in evidence under this section. *Moran and others v. Mittu Bibee and others* (I. L. R., 2 Cal., 58).

Plaintiff having sued for arrears of rent payable under a kabuliat in respect of a share of four villages, the defendant pleaded that he had been put in possession of one only of the four leased to him and that, therefore, he was not liable to the whole claim. Parol evidence was admitted to show that, at the time the kabuliat was granted, it had been agreed between the plaintiff and defendant, the title of the former

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being under dispute, that the whole rent payable under the kabuliat should be payable in respect of such of the villages as should actually come into the defendant's possession. *Held* that such parol evidence was rightly admitted under provisoes (2) and (3) of this section, there being no stipulation in the lease that the defendant should only pay rent on being put completely into possession, and that, although payment of rent is not ordinarily enforced unless the lessor puts the lessee into possession, it was quite competent to the parties to waive such privilege *Ramkishore Lall v. Nundram* (4 C. L. R., 100).

It was agreed between the Bank of Bengal at Calcutta and Cohen & Co., who carried on business there, that the Branch of the Bank at Cawnpore should discount bills to a certain extent drawn by A. M. Cohen, who carried on business at Calcutta on Cohen & Co. against goods to be consigned by rail to Cohen & Co., and the railway receipts for such consignments should be forwarded to Cohen & Co. through the Cawnpore Branch of the Bank. A. M. Cohen accordingly drew a bill on C & Co. payable 21 days after date, which the Cawnpore Branch of the Bank discounted, receiving the railway receipt for certain goods consigned to C. and Co. C. & Co., having accepted this bill, the Bank handed over the railway receipt to them. In a suit by the Bank against Cohen, on the bill, the latter set up as a defence that the bill had been discounted by the Bank on the oral understanding that the railway receipt was not to be transferred to C. & Co. until they had paid the amount of the bill and that the Bank had, by the breach of this condition, determined the defendant's liability. *Held* by *Straight, J.*, (*Spankie, J.*, dissenting) that evidence of this oral understanding was not admissible even under proviso (3) of this section. *Cohen v. Bank of Bengal* (I. L. R., 2 All., 598).

In a suit to recover the balance of the purchase money of certain property sold by the plaintiff and made over to the defendants, such balance being secured by a kistibundi, by which it was agreed that on default being made in the payment of any one instalment the whole amount should become due, the defendant pleaded in defence that, at the time of making the kistibundi, a verbal agreement was entered into with the plaintiff, to the effect that the obligation to pay the instalments should not be put into force until the plaintiff had paid a third party a debt charged on the property conveyed, which debt was unpaid at the time of the bringing of this suit. *Held* that oral evidence of such agreement was not admissible under proviso (3) of this section; that proviso being intended to introduce the rule of English law that until the condition precedent is performed, and the contract made binding there is, in fact, no binding written agreement at all—and therefore not applicable to a case where the written agreement had been actually performed to a large extent *Held* also, that the true meaning of the words "any obligation," in the proviso in question, is any obligation whatever under the contract and not some particular obligation which the contract may contain. *Jugtanund Misser v. Nerghan Singh and another* (I. L. R., 6 Cal, 433; 7 C. L. R., 347).

A, by a deed of sale absolute on its face, transferred certain land to B for the sum of Rs. 379. A alleged that, at the time the transaction was entered into, it was understood and orally agreed that the sale was merely by way of security for the payment of Rs. 400 due to a third party, C., under a compromise made by A with C for the satisfaction of a decree for Rs. 832, which the latter held against A; and that it was, at the same time, orally agreed between A and B that on the payment of the money by A to C, the deed of sale should be delivered to A. Subsequently A brought a suit against B for the return of the kobala alleging that the whole of the money had been paid to C. *Held* that provisos (3) and (4) of section prevented the admission of evidence of the oral agreement to contradict the deed of sale which had admittedly been contemporaneous. *Ramdoyal Bajpie v. Heera Lall Paray* (3 C. L. R., 386).

In *Umedmal Motiram v. Davu bin Dhondiba* (I. L. R., 2 Bom., 547) the facts were as follows: D sold a house to P and executed a deed of conveyance which was duly registered. The purchase money was never paid by P, who consequently never obtained possession. Shortly after the conveyance had been registered, P returned it to D with the endorsement thereon to the effect that it was returned because P was unable to pay the purchase money. The right title and interest of P in the house were subsequently attached and sold under a decree obtained against him by the plaintiff who became the purchaser and sued D for possession.

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It was *held* (inter alia) that the endorsement on the conveyance could not affect the property ; that the conveyance, by D to P having been registered, no agreement to rescind it could be proved under proviso (4) of this section.

A registered lease, renewable at the former rent, at the expiration of the period fixed thereby, having been granted, it appeared that the lessors were entitled to a six annas share only, instead of to the whole property leased. It was alleged by the lessee that it was then verbally arranged that the rent should be reduced in proportion to the interest of the lessors. On the expiration of the term the lessee sued, for specific performance of the contract, as modified, for renewal of the lease of the six annas. *Held* that evidence of the parol variation of the contract was not admissible under proviso (4) of the section, and that the plaintiff was not entitled to the relief sought. *Dwarka Nath Chattopadhya and another v. Bhogoban Panda and others* (7 C. L. R., 577.)

The obligors of a bond for the payment of money, describing themselves as "Sons of R Zemindar and pattidar, resident of Mouza S," hypothecated as collateral security for such payment "their one biswa five biswansi share." *Held*, in a suit on the bond to enforce a charge on the one biswa five biswansi share of the obligors in Mouza S, that, under proviso (6) of this section and section 95 post, evidence might be given to show that the obligors hypothecated by the bond their share in Mouza S. *Ramlall v. Harrison* (I. L. R., 2 All., 832.)

Exclusion of evidence to explain or amend ambiguous document.

93. When the language used in a document is, on its face ambiguous or defective evidence may not be given of facts which would show its meaning or supply its defects.

Illustrations.

(*a.*) A agrees, in writing, to sell a horse to B for Rs. 1000, or Rs. 1,500 Evidence cannot be given to show which price was to be given.

(*b.*) A deed contains blanks. Evidence cannot be given of facts which would show how they were meant to be filled.

Notes.

Under the Contract Act, s. 29, an agreement is void if its meaning is not certain and under this section of the Evidence Act, where the language of a deed is on its face, ambiguous or defective, no evidence can be given to make it certain. *Deojit v. Pitambar* (I. L. R., I. All. 275.)

Exclusion of evidence against application of document to existing facts.

94. When language used in a document is plain in itself, and when it applies accurately to existing facts, evidence may not be given to show that it was not meant to apply to such facts.

Illustrations.

A sells to B, by deed, an estate at Rampur containing 100 bighas. A has an estate at Rampur containing 100 bighas. Evidence may not be given of the fact that the estate meant to be sold was one situated at a different place and of a different size.

Evidence as to document unmeaning in reference to existing facts.

95. When language used in a document is plain in itself, but is unmeaning in reference to existing facts, evidence may be given to show that it was used in a peculiar sense.

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Illustrations.

A sells to B, by deed, my house in Calcutta. A had no house in Calcutta but it appears that he had a house at Howrah, of which B had been in possession since the execution of the deed.

These facts may be proved to show that the deed relates to the house at Howrah.

Notes.

Where the widow of a certain person, whose share in an estate had been sold in execution of a decree and purchased by the decreeholder, sought to guard the share from the effects of the sale by pleading *firstly* that the sale certificate did not correctly describe the share in suit, and *secondly* that her husband's share had been conveyed away to her at a period long anterior to the sale and the Lower Court ruled that the sale certificate was inoperative, partly because in permitting it to be inaccurately framed, the decreeholder may have intended to deal fraudulently, and partly because extraneous evidence of the sale could not be received *Held* by the High Court that though the establishment of fraud on the part of the decreeholder would prevent his recovering anything, the existence of fraud in his dealings had not been found as a fact in this case and could not be assumed, and that where a sale certificate was accurate as to any part of the description of the subject of sale, and could be used to identify it, with the assistance of extraneous evidence, such evidence could be received under this section to show what was intended to be dealt with. *Mussamat Maleeban and others* v. *Mussamat Raseeda and others* (25 W, R, 401).

See also the case *Ramlall* v. *Harrison* (I L R, 2 all, 832) cited under s. 92 (ante p. 79).

Evidence as to application of language which can apply to one only of several persons.

96. When the facts are such that the language used might have been meant to apply to any one, and could not have been meant to apply to more than one, of several persons or things, evidence may be given of facts which show which of those persons or things it was intended to apply to.

Illustrations

(*a.*) A agrees to sell to B, for Rs 1,000 my white horse. A has two white horses. Evidence may be given of facts which show which of them was meant.

(*b.*) A agrees to accompany B to Haidarabad. Evidence may be given of facts showing whether Haidarabad in the Dekkhan or Haidarabad in Sindh was meant.

Evidence as to application of language to one of two sets of facts to neither of which the whole correctly applies.

97. When the language used applies partly to one set of existing facts, and partly to another set of existing facts, but the whole of it does not apply correctly to either, evidence may be given to show to which of the two it was meant to apply.

Illustration.

A agrees to sell to B my land at X, in the occupation of Y. A has land at X, but not in the occupation of Y, and he has land in the occupation of Y, but it is not at X. Evidence may be given of facts showing which he meant to sell.

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98. Evidence may be given to show the meaning of illegible or not commonly intelligible characters, of foreign, obsolete, technical, local, and provincial expressions, of abbreviations and of words used in a peculiar sense.

Evidence as to meaning of illegible characters, &.

Illustrations.

A, a sculptor, agrees to sell to B, "all my mods." A has both models and modelling tools. Evidence may be given to show which he meant to sell.

Notes.

In a suit to recover possession of immoveable property under a grant from the Rajah of P, on the ground that the grant was prior in time to the grant from the same grantor, under which the defendants professed to hold, it was found that the plaintiffs' grant was dated "25 Falgoon in the year 16."

Held, that the meaning of the words "in the year 16:" might be shown by reference to another grant signed by the same person from which it appeared that the year 37" meant the 37th year of the Rajah of P, and that it corresponded with 1186 B. S. *Equitable Coal Company Ld. v. Gonesh Chunder Banerjee and another* (9 C. L. R., 276.)

99. Persons who are not parties to a document, or their representatives in interest, may give evidence of any facts tending to show a contemporaneous agreement varying the terms of the document.

Who may give evidence of agreement varying terms of document.

Illustrations.

A and B make a contract in writing that B shall sell A certain cotton to be paid for on delivery. At the same time they make an oral agreement, that three months' credit shall be given to A. This could not be shown as between A and B, but it might be shown by C, if it affected his interests.

100. Nothing in this chapter contained shall be taken to affect any of the provisions of the Indian Succession Act (X of 1865) as to the construction of wills.

Saving of provisions of Indian Succession Act relating to wills.

Note.

The provisions as to the construction of wills will be found in Part XI (sections 61 to 98 both inclusive).

PART III.

PRODUCTION AND EFFECT OF EVIDENCE.

CHAPTER VII.

OF THE BURDEN OF PROOF.

101. Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist.

Burden of proof.

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When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

Illustrations.

(*a.*) A desires a Court to give judgment that B shall be punished for a crime which A says B has committed.

A must prove that B has committed the crime.

(*b.*) A desires a Court to give judgment that he is entitled to certain land in the possession of B, by reason of facts which he asserts and which B denies, to be true.

A must prove the existence of those facts.

Notes.

In 1862 plaintiff got a decree in a resumption suit against defendant's predecessor, declaring his right to assess certain lands.

In 1874 he brought a suit for assessment of the same lands, and, the question of jurisdiction having been raised, one of the issues framed was, "Whether the resumed *lakhiraj* was of date anterior to the permanent settlement." *Held*, that it did not lie on the plaintiff to show that the Civil Court had jurisdiction to entertain the suit, by proving that the grant had been made since the permanent settlement; but that it lay on the defendant to show that it had not, because (1) the affirmative of the issue was asserted by the defendant and because (2) the terms of the *lakhiraj* grant under which the defendant claimed would be more within his knowledge than within that of the plaintiff.

In such cases, if any presumption were to be made as regards jurisdiction, it would be in favour of the ordinary and general tribunals of the country, to the exclusion of any special jurisdiction to be exercised under a particular statute by the Collector. *Hira Lall Paramanick and others v. Barikunnissa Beebee* (1 C. L. R., 596; I.L.R., 3 Cal., 501).

A widow brought a suit claiming administration to the estate and effects of her deceased husband as his only legal personal representative, against a caveator claiming the whole family property as an undivided second cousin of the deceased and sole surviving member of the family. The widow asserted a division and that the whole property of the deceased had been self-acquired by his father. The Court of first instance found against division and against self-acquisition, laying the burthen of proof of each question entirely on the party asserting the facts. On appeal it was contended for the appellant (the plaintiff) that the *onus* on plaintiff was sufficiently discharged when it was shown that the two branches of the family were trading separately, and that certain items of property were acquired in the names of members of the branch of the family to which plaintiff's husband belonged; that then it rested with the other side to show that there were joint funds from which the purchases could have been made.

Held, in accordance with the view of the Judicial Committee of the Privy Council in *Dhurm Das Pandey v. Mussamat Soondri Dibiah* (3 Moo. I. A., 229; 5 W. R. P. C., 39) and the observations of *Couch, C. J.*, in *Taruck Chunder Totadar v. Joodhesteer Chunder Koondoo* (19 W. R., 178) that such a contention could not be maintained. *Vidavalli v. Narayana.* (I. L. R., 2 Mad., 19).

In a suit to recover arrears of rent under a kabuliat, the defendant who had paid rent for upwards of 4 or 5 years pleaded that he had obtained possession of portion only of the lands demised. *Held* that the *onus* was upon the defendant. *Bani Madhub Mooherjee v. Sridhur Deb Ghattak* (10 C. L. R., 555.)

102. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

On whom burden of proof lies.

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Illustrations.

(*a.*) A sues B for land of which B is in possession, and which, as A asserts, was left to A by the will of C, B's father.

If no evidence were given on either side, B would be entitled to retain his possession.

Therefore the burden of proof is on A.

(*b*) A sues B for money due on a bond.

The execution of the bond is admitted, but B says that it was obtained by fraud, which A denies.

If no evidence were given on either side, A would succeed, as the bond is not disputed and the fraud is not proved.

Therefore the burden of proof is on B.

Burden of proof as to particular fact.

103. The burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

Illustration.

A prosecutes B for theft, and wishes the Court to believe that B admitted the theft to C. A must prove the admission.

B wishes the Court to believe that, at the time in question, he was elsewhere. He must prove it.

Note.

See first case quoted in notes to s. 101 (ante p. 82.)

Burden of proving fact to be proved to make evidence admissible.

104. The burden of proving any fact necessary to be proved in order to enable any person to give evidence of any other fact is on the person who wishes to give such evidence.

Illustrations.

(*a*) A wishes to prove a dying declaration by B. A must prove B's death.

(*b*) A wishes to prove, by secondary evidence, the contents of a lost document.

A must prove that the document has been lost.

Burden of proving that case of accused comes within exceptions.

105. When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the General Exceptions in the Indian Penal Code, or within any special exception or proviso contained in any other part of the same Code, or in any law defining the offence, is upon him, and the Court shall presume the absence of such circumstances.

Illustrations.

(*a.*) A, accused of murder, alleges that, by reason of unsoundness of mind, he did not know the nature of the act.

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The burden of proof is on A.

(*b.*) A accused of murder, alleges that, by grave and sudden provocation, he was deprived of the power of self-control.

The burden of proof is on A.

(*c.*) Section three hundred and twenty-five of the Indian Penal Code provides that whoever, except in the case provided for by section three hundred and thirty-five, voluntarily causes grievous hurt, shall be subject to certain punishments.

A is charged with voluntarily causing grievous hurt under section three hundred and twenty-five.

The burden of proving the circumstances bringing the case under section three hundred and thirty-five lies on A.

Notes.

Under the provisions of this section, an answer, setting up the right of private defence, must be supported by evidence, giving a full and true account of the transaction from which the charge against an accused person arises. No accused person can, at the same time, deny committing an act and justify it. The law does not admit of justification by putting forward hypothetical cases; it must be by proof of the actual facts. *Jamsheer Sirdar and others* (1 C. L. R., 62.)

In all criminal cases tried in the mofussil it is incumbent on the accused, since the passing of this Act, to prove the existence (if any) of circumstances which bring the offence charged within the general or special provisions contained in any part of the Penal Code or in any law defining such offence.

It was considered doubtful, owing to sections 26 and 27 of Act XVIII of 1862 remaining unrepealed, which were intended to apply only to the Supreme (now High) Courts, whether the provisions of this section applied to the Presidency Towns. *Markby J., held* that although sections 235 and 237 of Act XXV of 1861 had been repealed it might still be inferred from illustration (a) s. 439 of Act X of 1872, that it was unnecessary specifically to allege in a charge the absence of all general and some at least of the other exceptions mentioned in the Penal Code. The operation of the illustration, however, is strictly confined to the statement of the offence in the charge. *Shibo Prosad Panda* (I. L. R., 4 Cal., 124).

So much of Act XVIII of 1862 as had not been repealed has been repealed by Act X of 1882.

The fifth paragraph of s. 221 of Act X of 1882 and illustrations (*a*) and (*b*) should be read along with this section of the Evidence Act.

"The fact that the charge is made is equivalent to a statement that every legal condition required by law to constitute the offence charged was fulfilled in the particular case.

Illustrations.

(*a*) A is charged with the murder of B, this is equivalent to a statement that A's act fell within the definition of murder given in sections 299 and 300 of the Indian Penal Code; that it did not fall within any of the general exceptions of the same Code; and that it did not fall within any of the five exceptions to s. 300, or that, if it did fall within Exception 1, one or other of the three provisos to that exception applied to it.

(*b.*) A is charged, under section 326 of Indian Penal Code with voluntarily causing gievous hurt to B, by means of an instrument for shooting. This is equivalent to a statement that the case was not provided for by section 335 of the Indian Penal Code, and that the general exceptions did not apply to it."

Burden of proving fact especially within knowledge.

106. When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.

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Illustrations.

(*a.*) When a person does an act with some intention other than that which the character and circumstances of the act suggest, the burden of proving that intention is upon him.

(*b.*) A is charged with travelling on a railway without a ticket.
The burden of proving that he had a ticket is on him.

Note.

See first case quoted in notes to s. 101 (ante p. 82.)

Burden of proving death of person known to have been alive within thirty years.

107. When the question is whether a man is alive or dead, and it is shown that he was alive within thirty years, the burden of proving that he is dead is on the person who affirms it.

Burden of proving that person is alive who has not been heard of for seven years.

108. *Provided that when* the question is whether a man is alive or dead, and it is proved that he has not been heard of for seven years by those who would naturally have heard of him if he had been alive, the burden of proving that he is alive is *shifted to* the person who affirms it.

Notes.

The words in italics indicate the changes made in this section by s. 9 of Act XVIII of 1872.

The reversioners next after J to the estate of S deceased sued to avoid an alienation of S's estate affecting their reversionary right made by his widow. J had not been heard of for eight or nine years and there was no proof of his being alive. *Held* that his death might be presumed under the provisions of this section, for the purposes of the suit, although, in a suit for the purpose of administering the estate, the Court might have to apply the Hindu law of succession prescribed when a person is missing and not dead. *Parmeshar Rai and others v. Bisheshar Singh and others* (I. L. R., 1 All., 53.)

F, one of the heirs to the property of his parents (the family being Mahomedans) was "missing" when they died, and subsequently, when the other heirs to such property sued his daughter M for possession of a portion of such property, M set up as a defence to the suit that her father was alive, and that during his lifetime the plaintiffs could not claim his share in such portion. *Held* by *Stuart, C. J.*, and *Spankie, J.*, that the suit, being one to enforce a right of inheritance, must be governed by the Mahomedan law relating to a "missing" person. *Parmeshar Rai v. Bisheshar Singh* distinguished. *Held* by *Stuart, C. J.*, that, according to Mahomedan Law, ninety years not having elapsed from F's birth, his share could not be claimed by the plaintiffs; but must remain in abeyance until the expiry of that period, or his death was proved. *Held* by *Pearson and Spankie, J. J.*, that F being "missing" when his parents died, his daughter, according to that law, was not entitled to hold his share either as heir or trustee. *Hasan Ali and others v. Maherban* (I. L. R., 2 All., 625.)

Burden of proof as to relationship in the cases of partners, landlord and tenant, principal and agent.

109. When the question is whether persons are partners, landlord and tenant, or principal and agent and it has been shown that they have been acting as such, the burden of proving that they do not stand, or have ceased to stand, to each other in those relationships respectively, is on the person who affirms it.

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Notes.

When the relationship of landlord and tenant has once been proved to exist, the mere non-payment of rent, though for many years, is not sufficient to show that the relationship has ceased; and a tenant who is sued for rent and contends that such relationship has ceased, is bound to prove that fact by some affirmative proof, and more especially is he so bound, when he does not expressly deny that he still continues to hold the land in question in the suit. *Rungo Lall Mundul v. Abdool Guffoor and others* (I. L. R., 4 Cal., 314; 3 C. L. R., 119).

Where the relation of landlord and tenant is proved to have existed, it lies on the defendant, in possession of the land, to prove that the relation was put an end to at such a period anterior to the suit as would entitle the defendant to rely on his possession as adverse to the plaintiff for 12 years.

Non-payment of rent for upwards of 12 years and a grant of potta by Government to defendant for 5 years do not, when Government claims no interest adverse to plaintiff, and plaintiff does not consent to defendant becoming tenant to Government, create any possession in defendant adverse to plaintiff. *Rungo Lall Mundul v. Abdool Guffoor* (I. L. R., 4 Cal., 314) approved. *Tiruchurna Perumal Nadan and another v. Sanguvien and others* (I. L. R., 3 Mad., 118).

The plaintiffs being the owners of 4 annas share and the defendants No 2 the ownership of the remaining 12 annas share in an estate, the latter granted a putnee of their undivided share to the defendant No. 1 and subsequently a private partition was effected under which certain lands were appropriated to the plaintiffs as their 4 annas share, and the remainder to the putnidars as representing their 12 annas share. Under this partition the putnidars held possession for about 40 years, when on a butwara, to which they were not parties, being effected by the Collector, a different division of the estate was made, and the plaintiffs sued to obtain possession of such portion of the estate allotted to them under the butwara as was in the hands of the putnidars, alleging that the private partition was meant to be temporary only and was liable to be determined on a butwara being effected. *Held, Tottenham, J., dissenting,* that the *onus* was upon the plaintiffs to show that the arrangement under the private partition had determined. *Obhoy Churn Sircar and others v. Harinath Roy and others* (10 C. L. R., 81.)

110. When the question is whether any person is owner of anything of which he is shown to be in possession the burden of proving that he is not the owner is on the person who affirms that he is not the owner.

Burden of proof as to ownership.

Illustrations I. L. R. 9 C. 125 Notes. I. L. R. 9 C. 130.

In a suit for possession where the plaintiff proved that he had been in possession of the lands in dispute, that he had been ousted by the defendants, who were unable to give any proof of their right so to oust him, or of a superior title, *Held*, (*Prinsep, J., dissenting*), that the prior possession of the plaintiff was *prima facie* evidence of title, and that he was entitled to a decree.

Per *Prinsep, J.* :—Proof of prior possession and of illegal dispossession are in themselves no evidence of title except in a possessory suit under the Specific Relief Act (1 of 1877) This section applies only to actual and present possession, and does not declare generally that possession shall always be *prima facie* evidence of title. *Kawa Manji and others v. Khowaz Nussio* (5 C. L. R., 278.)

111. Where there is a question as to the good faith of a transaction between parties, one of whom stands to the other in a position of active confidence, the burden of proving the good faith of the transaction is on the party who is in a position of active confidence.

Proof of good faith in transactions where one party is in relation of active confidence.

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Illustrations.

(*a.*) The good faith of a sale by a client to an attorney is in question in a suit brought by the client. The burden of proving the good faith of the transaction is on the attorney.

(*b.*) The good faith of a sale by a son just come of age to a father is in question in a suit brought by the son. The burden of proving the good faith of the transaction is on the father.

112. The fact that any person was born during the continuance of a valid marriage between his mother and any man, or within two hundred and eighty days after its dissolution, the mother remaining unmarried shall be conclusive proof that he is the legitimate son of that man, unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten.

Birth, during marriage, conclusive proof of legitimacy.

113. A notification in the *Gazette of India* that any portion of British territory has been ceded to any Native State, Prince or Ruler, shall be conclusive proof that a valid cession of such territory took place at the date mentioned in such notification.

Proof of cession of territory.

Notes.

The power to cede territory was not one of the powers to which the Secretary of State for India in Council succeeded under Act 21 and 22 Vic., C. 106, when the Government of India was by that statute, transferred to Her Majesty, inasmuch as such a power was not possessed by the East India Company.

The Indian Legislature cannot make, and the Crown cannot sanction, a law having for its object the dismemberment of the State in times of peace, as such a law must of necessity affect the authority of Parliament and those unwritten laws and constitutions of the United Kingdom of Great Britain and Ireland, whereon depends the allegiance of persons to the Crown of the United Kingdom.

This section, therefore, though not disallowed, is not protected by s. 24 of Stat. 24 and 25 Vict, c. 67 and the direction therein contained, that a notification in the *Gazette of India*, that any portion of British territory has been ceded to any Native State, Prince or Ruler, shall be conclusive proof that a valid cession of territory took place on the date mentioned in such notification, cannot be followed. *Damodar Gordhan v. Gonesh Devrani and others* (10 Bom., H. C. R., 37).

114. The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and private business in their relation to the facts of the particular case.

Court may presume existence of certain facts.

Illustrations.

The Court may presume—

(*a.*) That a man who is in possession of stolen goods, soon after the theft, is either the thief or has received the goods knowing them to be stolen, unless he can account for his possession;

(*b.*) That an accomplice is unworthy of credit, unless he is corroborated in material particulars;

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(*c.*) That a bill of exchange accepted or endorsed, was accepted or endorsed for good consideration;

(*d.*) That a thing or state of things which has been shown to be in existence within a period shorter than that within which such thing or state of things usually cease to exist, is still in existence;

(*e.*) That judicial and official acts have been regularly performed;

(*f.*) That the common course of business has been followed in particular cases;

(*g.*) That evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it;

(*h.*) That if a man refuses to answer a question which he is not compelled to answer by law, the answer, if given, would be unfavourable to him;

(*i.*) That when a document creating an obligation is in the hands of the obligor the obligation has been discharged.

But the Court shall also have regard to such facts as the following, in considering whether such maxims do or do not apply to the particular case before it:

As to illustration (*a.*)—A shop keeper has in his till a marked rupee soon after it was stolen, and cannot account for its possession specifically, but is continually receiving rupees in the course of business:

As to illustration (*b.*)—A a person of the highest character, is tried for causing a man's death by an act of negligence in arranging certain machinery. B, a person of equally good character, who also took part in the arrangement, describes precisely what was done, and admits and explains the common carelessness of A and himself:

As to illustration (*b.*) —A, crime is committed by several persons. A, B, and C, three of the criminals, are captured on the spot and kept apart from each other. Each gives an account of the crime implicating D, and the accounts corroborate each other in such a manner as to render previous concert highly improbable:

As to illustration (*c.*)—A, the drawer of a bill of exchange, was a man of business. B the acceptor, was a young and ignorant person, completely under A's influence:

As to illustration (*d.*)—It is proved that a river ran in a certain course five years ago, but it is known that there have been floods since that time which might change its course:

As to illustration (*e.*)—A judicial act, the regularity of which is in question, was performed under exceptional circumstances:

As to illustration (*f.*)—The question is, whether a letter was received. It is shown to have been posted, but the usual course of the post was interrupted by disturbances:

As to illustration (*g.*)—A man refuses to produce a document which would bear on a contract of small importance on which he is sued, but which might also injure the feelings and reputation of his family:

As to illustration (*h.*)—A man refuses to answer a question which he is not compelled by law to answer, but the answer to it might cause loss to him in matters unconnected with the matter in relation to which it is asked:

As to illustration (*i.*)—A bond is in possession of the obligor, but the circumstances of the case are such that he may have stolen it.

Notes.

Although under s. 133 of this Act, the conviction of a prisoner on the uncorroborated testimony of an accomplice is not illegal, the Court, having reference to illustration (*b*) of this section, considered in this case that the accomplice was

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unworthy of credit because his evidence was wholly without corroboration. *Queen v. Lucheepershad* (19 W. R. Cr., 43.)

In the *Queen v. Kos and others* (19 W. R, Cr., 48) the accomplice was held to have been corroborated in material particulars.

In the *Queen v. Udhan Bind and others* (19 W. R., Cr., 68) it was held to be unsafe, to convict the accused, where the testimony of the accomplice is not corroborated in any material point, except by the confession of a fellow prisoner, whose testimony likewise requires corroboration.

In *Queen v. Ramsodoy Chuckerbutty* (20 W. R, Cr, 19) the Court (*Mitter* and *Pontifex, J. J.*,— *Glover, J.*, dissenting) refused to convict in this case on the uncorroborated testimony of an accomplice who had previously been convicted of the same offence on her own confession.

In *Queen v. Sadhu Mundul* (21 W. R, Cr., 69), it was *held* on a consideration of this section that the Legislature intended to lay down as a maxim or rule of evidence that the testimony of an accomplice is unworthy of credit, so far as it implicates an accused person, unless it is corroborated in material particulars in respect to that person; and it is the duty of a Court which has to deal with an accomplice's testimony to consider whether this maxim applies to exclude that testimony or not, and in a case tried by Jury, to draw the attention of the Jury to the principles relative to the reception of an accomplice's testimony.

An accused person cannot be convicted solely upon the evidence of persons who are more or less participators in the crime of which he is accused. Where a witness admits that he was cognisant of the crime as to which he testifies, and took no means to prevent or disclose it, his evidence must be considered as no better than that of an accomplice. *Queen v. Chando Chandalinee and two others* (24 W. R., Cr., 55).

See also the case of *Queen v. Baijoo Chowdhree and others* (25 W. R., Cr., 43) cited under S. 30 (ante p. 24).

In *Reg v. Rama Sami Padayachi and another* (I. L. R., 1. Mad., 394), it was *held* that the rule in this section coincides with the rule observed in England, that though the evidence of an accomplice should be carefully scanned and may be treated as unworthy of credit, yet if the Jury or the Court credits the evidence, a conviction proceeding upon it is not illegal

See also the case *Reg v. Malapa bin Kapana and others* (11 Bom. H. C. R., 196) cited under S. 30 (ante p. 26).

A conviction based on the testimony of approvers, uncorroborated as to the identity of the accused person, cannot be sustained; and confessions of prisoners, implicating him, cannot be accepted as sufficient corroboration of such testimony. *Reg. v. Budhu Nanku and others* (I. L. R., 1 Bom., 475)

In the foot-note to that case, on p. 476 of the same volume, is cited the case of *Reg. v. Chatur Purshotum* in which *West and Nanabhai Hari Das. J. J., held* that "not only as to persons spoken of by an accomplice must there be corroborative evidence, but, which is more important still, as to the *corpus delicti* there must be some *prima facie* evidence pointing the same way to make the evidence of the accomplice satisfactory. As has been recognised in many cases, the man who charges another with the commission of crime in which he is himself implicated requires corroboration as to the particular person, but still more as to the existence itself of any crime, or of the particular crime, from the penalty of which he is made free on the understanding that his testimony will be valuable for the prosecution."

In a suit on a bond where defendant pleaded satisfaction, *Held* under this section, that, as the bond was in the hands of the obligor, who was not shown to have stolen it, it was rightly presumed that the obligation had been discharged. *Gunesh Chunder Shaha v. Khatoo Meah* (22 W. R., 265).

See Queen v. Obhana I. L. R. 16 C. 642.

CHAPTER VIII.

ESTOPPEL.

In *Ganges Manufacturing Company v. Sooruimull* (5 C. L. R., 533; I. L. R., 5 Cal., 669) it was contended by the appellants that sections 115 to 117, contained in this Chapter lay down the *only* rules of estoppel, which are now intended

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to be in force in British India ; that those rules are treated by the Act as rules of evidence, and that by section 2 all rules of evidence are repealed, except those which the Act contains.. ... .The fallacy of this contention lies in supposing that *all rules of estoppel* are also *rules of evidence*.....Estoppels, in the sense in which that term is used in English legal phraseology, are matters of infinite variety and are by no means confined to the subjects which are dealt with in this Chapter ....

A man may be estopped not only from giving particular evidence, but from doing an act or relying upon any particular argument or contention, which the rules of equity and good conscience prevent him from using as against his opponent.....

Whatever the true meaning of section 2 may be as regards estoppel, it was held not to debar the plaintiffs in this suit from availing themselves of their present contention as against the defendants (which was one of estoppel).

As to estoppels Taylor on Evidence (7th Ed.) pp. 106-120, and pp. 711 and 712 should be consulted.

Estoppel.

115. When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing.

Illustration.

A intentionally and falsely leads B to believe that certain land belongs to A, and thereby induces B to buy and pay for it.

The land afterwards becomes the property of A, and A seeks to set aside the sale on the ground that, at the time of the sale, he had no title. He must not be allowed to prove his want of title.

Notes.

D, who was the natural brother of H, but had been adopted into another family on the one part, and G, on the other part, referred to arbitration a dispute between them concerning the succession to the estate of S, the father of D and H. H, having been born deaf and dumb, was under Hindu law incapable of inheriting his father's estate, and he was not a party to the arbitration-proceedings. The award, to which G, after it was made, expressed his assent in writing, declared that H was the heir to his father's estate.

Held, by a majority of the Full Bench of the High Court at Allahabad, (*Spankie, J., dissenting*), in a suit by H against G for possession of a portion of his father's estate, that the plaintiff, not being a party to the award, was not bound thereby, and not being bound thereby, could not claim to take any advantage therefrom ; that the award could not confer on him a right which he did not possess by law nor could it constitute evidence of a right which the law disallowed ; that the assent of the defendant to the award could not convey to the plaintiff, a right of inheritance which did not devolve on him by law ; that it could not be contended that the defendant had made a gift of the property to the plaintiff, inasmuch as it had been adjudged by the award that the property did not belong to the defendant ; that the defendant by his assent to the award was not estopped from questioning the plaintiff's right of inheritance by the provisions of this section ; and that, under these circumstances, the plaintiff could not succeed in his suit. *Gunga Sahai and another v. Hira Singh* (I. L. R., 2 All., 809).

In a suit for rent brought against an ijaradar by a person claiming to be the darpatnidar of certain property, the defendant resisted the claim upon the ground that another person was the real owner of the darpatni and this person was made a co-defendant and intervened for the purpose of supporting his title to the rent. It

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appeared that, in the year 1259, A purchased the darpatni estate, and sold it in 1265 to his wife B, and son C. Afterwards A sucessfully resisted a suit for rent brought against him by the present plaintiff as superior landlord, on the ground that he had parted with his interest in the estate to B and C. The plaintiff then sued B and C for the rent and obtained a decree, under which the darpatni was sold to him. He now sued the ijaradar. The intervening defendant contended that A had mortgaged the property to him, and that such proceedings had been taken on the mortgage that he was entitled in A's right to the rent of the property as the owner of it.

Held that the intervening defendant could take no better title than A himself; and that, as A had directly induced the plaintiff to believe that he had sold the property absolutely to B and C, and had led him to bring a suit against them for the rent, and under the decree obtained in that suit to purchase their interest in the property, the intervening defendant could not set up a claim to the rent in the present suit as against the plaintiff. *Aunath Nath Deb v. Bishtu Chunder Roy and others* (I. L. R., 4 Cal., 783).

A, having insured his life in a certain Life Insurance Co, assigned his rights under the policy to B, the assignment on the face of it expressing no consideration whatever. The fact of the assignment was notified to the Company. B, after paying all premia due, died appointing C and D his executors, who took out probate of his will and paid all subsequent premia on the policy. A died, and C and D then demanded payment of the policy-money. The Company, however, refused payment unless C and D first obtained the concurrence of the legal representative of A to the payment.

Held that the Company were justified in refusing to pay the money in the absence of the legal representative of A.

This section of the Evidence Act, which contemplates a person "by his declaration, act or omission intentionally causing or permitting another person to believe a thing to be true and to act on that belief," in which case he cannot "deny the truth of the thing" refers to the belief in a fact and not in a proposition of law. *Rajnarain Bose v. The Universal Life Assurance Co* (I. L. R., 7 Cal 594; 10 C. L. R., 561).

In execution of a decree for costs the defendants caused the "rights and interest of the judgment debtor to the extent of 16 annas," in a particular mouzah, to be put up for sale. It appeared that in a former suit, the defendants had already been adjudged a 12 annas share in the mouzah. The plaintiff who became the purchaser, claimed to be entitled to the whole 16 annas, alleging that he had been misled by the description of the property sold, and contending that the defendants were estopped under this section from denying that 16 annas had been put up for sale. *Held* that, to bring the case within this section, the following findings were necessary,

(1.) That the plaintiff believed that the judgment debtor, whose rights and interest were sold, was the owner of the whole 16 annas.

(2.) That, acting upon that belief, he purchased the property at the sale.

(3.) That that belief, and the plaintiff's so acting upon that belief, were brought about by some declaration, act or omission, on the part of the defendant, which declaration, act or omission were intentionally made in order to produce that result, and that, inasmuch as the finding of the District Judge had not amounted to this, there was no estoppel. *E. Solano and others v. Lalla Ram Lall* (7 C. L. R., p. 481.)

In *Babu Lakshman v. Govinda Kanji* (I. L. R., 4 Bom., 594) *Melvill, J.*, in the course of his judgment, when speaking of the remedial jurisdiction exercised by Courts of Equity in England by virtue of which they admit parol evidence of conduct to estop a person from converting a transaction which he himself has treated as a mortgage into a sale, said "I will only further observe upon this point that, if any one is inclined to adopt the doctrine of part-performance to the full extent to which it has been carried in the English cases, he need have no difficulty in holding that the rule of estoppel, as laid down in s. 115 of the Indian Evidence Act covers the whole ground which is covered by the theory of part-performance; and under that view, the difficulty of the question which I am now considering at once vanishes.

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not say, in so many words, that, in order to constitute an estoppel, the acts, which a person has been induced to do, must have been prejudicial to his own interest.

It merely says that, "when one person has by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief," he shall be estopped from denying the truth of that thing. The terms of the section are sufficiently wide to cover the case of a grantor who has simply been allowed to remain in possession, on the understanding and belief that the transaction was one of mortgage, and thus every instance of what the English Courts call part-performance would be brought within the Indian rule of estoppel. I am not however myself inclined either to adopt the English doctrine of part-performance to the furthest extent, nor to push the Indian rule of estoppel to the same limit."

The facts of this case will be found on page 73 ante.

Estoppel of tenant; and of licensee of person in possession.

116. No tenant of immoveable property, or person claiming through such tenant, shall, during the continuance of the tenancy, be permitted to deny that the landlord of such tenant had, at the beginning of the tenancy, a title to such immoveable property; and no person who came upon any immoveable property by the license of the person in possession thereof, shall be permitted to deny that such person had a title to such possession at the time when such license was given.

Notes.

Plaintiff alleged a purchase of land from A and B, that he afterwards granted them a pottah and retained them in possession, and he put in evidence a consent decree obtained against B for arrears of rent *Held*, in a suit brought to recover possession on the ground of the tenancy having expired, that that decree worked no estoppel against B by virtue of his section and did not relieve the plaintiff from the necessity of proving his case completely. *Soldar Mondul and others v. Nilcomul Chatterjea and another* (1 C L. R., 528.)

This section does not debar one who has once been a tenant from contending that the title of his landlord has been lost or that his tenancy has determined It precludes him, only during the continuance of the tenancy, from contending that his landlord had no title at the commencement of the tenancy. *Ammu v. Ramakrishna Sastri and another* (I L R, 2 Mad., 226)

The plaintiff having sued to obtain possession of certain land which the defendant held as tenant and in respect of which he had for some years paid rents, the defendant alleged that, prior to the time when he became tenant, the plaintiff had for good consideration conveyed to him the premises leased together with other property.

This conveyance was found to be a mere benami transaction.

Held, that the plaintiff was not estopped from asserting the tenancy, and, under the circumstances, was entitled to recover. *Sabuktulla v. Hari* (10 C. L. R., 199.)

Two leases in respect of a 5 anna 6 gunda share and an 8 anna share of an estate respectively were granted to the defendant. Under the first the defendant was entitled to grow indigo up to October 1880 and under the other up to October 1881.

The plaintiffs having purchased the interests of the lessors in such leases, on the expiration of the first gave the defendant notice to quit and subsequently filed a suit to eject him from the estate.

Held, that the plaintiffs were not entitled, as owners of the 8 anna interest, to sue to stop the defendant's cultivation inasmuch as the lease in respect of that share had not expired; nor could they do so, as owners of the 5 annas 6 gundas, interest, inasmuch as it would be inequitable that, as owners of one interest in the estate, they should do anything which would render their acts as owners of another interest

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abortive and the advantages purchased by the tenant for valuable consideration practically valueless. *F. Holloway v. Hurdey Narain and others* (10 C. L. R., 381.)

Estoppel of acceptor of bill of exchange, bailee or licensee.

117. No acceptor of a bill of exchange shall be permitted to deny that the drawer had authority to draw such bill or to endorse it; nor shall any bailee or licensee be permitted to deny that his bailor or licensor had, at the time when the bailment or license commenced, authority to make such bailment or grant such license.

Explanation. (1).—The acceptor of a bill of exchange may deny that the bill was really drawn by the person by whom it purports to have been drawn.

Explanation. (2).—If a bailee delivers the goods bailed to a person other than the bailor, he may prove that such person had a right to them as against the bailor.

CHAPTER IX.

OF WITNESSES.

Who may testify.

118. All persons shall be competent to testify unless the Court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease whether of body or mind, or any other cause of the same kind.

Explanation.—A lunatic is not incompetent to testify, unless he is prevented by his lunacy from understanding the questions put to him and giving rational answers to them.

Notes.

The Court, in this case, declined to act on the evidence of a child 9 years old who had been examined without oath, although she was a competent witness under this section, inclining to the opinion that s. 13 of the Oaths Act, by which the evidence of a witness may be received in evidence although no oath was administered, rendered the deposition of a child of 9 years, whose deposition had been taken *advisedly, and not by omission*, without oath or solemn affirmation, inadmissible as evidence. *Queen v. Anunto Chuckerbutty and others* (22 W. R., Cr, 1.)

But this case has been overruled by the Full Bench ruling in *Queen v. Sewa Bhogta* (23 W. R., Cr., 12) which decided that the word, "omission" in s. 13 of the Oaths Act includes all omissions and is not limited to accidental or negligent omissions.

The evidence of a child of immature age, who the Sessions Judge considered understood the questions which were put to her and who was therefore a competent witness under this section, taken by the Sessions Judge on a simple affirmation, because she was not aware of the responsibility of an oath, was *held* to be admissible as evidence under s. 13 of the Oaths Act (X of 1873) *Queen v. Mussamat Itwarya* (22 W. R., Cr., 14.)

A charge of theft having been laid against A and B, process was issued against A only and upon his being put upon his trial, B who had not been arrested was produced as a witness for the defence. *Held* that his evidence was admissible.

In *Queen v. Ashruff Sheik* (6 W. R., Cr., 91) and in *Reg. v. Hanmanta* (I. L. R., I Bom., 610) the persons whose evidence was tendered had been arrested and were

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actually undischarged prisoners when they were produced as witnesses, but in the present case the witness had never been arrested and was in no sense a prisoner. *Mohesh Chunder Kopali and Mohesh Chunder Dass.* (10 C. L. R., 553).

Dumb Witnesses.

119. A witness who is unable to speak may give his evidence in any other manner in which he can make it intelligible, as by writing or by signs; but such writing must be written and the signs made in open Court. Evidence so given shall be deemed to be oral evidence.

Parties to civil suit and their wives or husbands.

Husband or wife of person under criminal trial.

120. In all civil proceedings the parties to the suit, and the husband or wife of any party to the suit, shall be competent witnesses. In criminal proceedings against any person, the husband or wife of such person respectively, shall be a competent witness.

Notes.

In a case tried by the Allahabad High Court A was made co-respondent in a Divorce case on the application of the respondent's Counsel. A was afterwards examined under subpœna as a witness for the petitioner and the Court ruled that he was bound to answer a question which he was asked whether he had had sexual intercourse with the respondent. Subsequently, at the final hearing, it was contended that in-as-much as A had not offered himself as a witness under s. 51 of Act IV of 1869 his evidence was not receivable. *Straight, J., held* that looking at the Indian Divorce Act along with the Evidence Act, where there are such special and distinct provisions as those contained in sections 51 and 52 of the former Act, which is in all other respects in full force, sections 120 and 132 of the latter Act could not be treated as practically repealing them; and that as A did not "offer" himself as a witness his evidence must be regarded as struck out and should not be taken into consideration in determining the questions at issue between the parties. *De Bretton v. De Bretton* (I. L. R., 4 All., 49).

Section 51 of Act IV of 1869 so far as affects this case is as follows:—

"The witnesses in all proceedings before the Court, where their attendance can be had, shall be examined orally, and any party may offer himself or herself as a witness, and shall be examined, and may be cross-examined and re-examined like any other witness."

Section 52 enacts. "On any petition presented by a wife, praying that her marriage may be dissolved by reason of her husband having been guilty of adultery coupled with cruelty, or of adultary coupled with desertion without reasonable excuse, the husband and wife respectively shall be competent and compellable to give evidence of or relating to such cruelty or desertion."

Judges and Magistrates.

121. No Judge or Magistrate shall, except upon the special order of some Court to which he is subordinate, be compelled to answer any questions as to his own conduct in Court as such Judge or Magistrate, or as to anything which came to his knowledge in Court as such Judge or Magistrate; but he may be examined as to other matters which occurred in his presence whilst he was so acting.

Illustrations.

(a) A on his trial before the Court of Session, says that a deposition was improperly taken by B, the Magistrate. B cannot be compelled to

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answer questions as to this, except upon the special order of a superior Court.

(*b.*) A is accused before the Court of Session of having given false evidence before B, a Magistrate. B cannot be asked what A said, except upon the special order of the superior Court.

(*c.*) A is accused before the Court of Session of attempting to murder a Police Officer whilst on his trial before B, a Sessions Judge. B may be examined as to what occurred.

Notes.

A Sessions Judge, finding in the course of a trial, as regards the examination of the accused person taken by the committing Subordinate Magistrate, that the provisions of s. 346 of Act X of 1872 had not been fully complied with, summoned the committing Magistrate and took his evidence that the accused person duly made the statement recorded. The Magistrate of the District objected to this proceeding of the Sessions Judge, contending that it was "contrary to law." The Sessions Judge referred the question whether or not his proceeding was contrary to law to the High Court at Allahabad.

Per *Stuart, C. J., Pearson, Oldfield,* and *Straight, J. J.*,—That the privilege given by this section is the privilege of the witness, *i. e.*, of the Judge or Magistrate of whom the question is asked; if he waives such privilege or does not object to answer such question, it does not lie in the mouth of any other person to assert the privilege: the reference, the objection not having been taken by the Subordinate Magistrate but by the Magistrate of the District, should be answered accordingly.

Per *Spankie, J*:—That a Sessions Judge, while trying a case, cannot *compel* a committing Magistrate to answer questions as to his own conduct in Court as such Magistrate. *Empress v. Chidda Khan* (I. L. R., 3 All., 573.)

Communications during marriage.

122. No person, who is or has been married, shall be compelled to disclose any communication made to him during marriage by any person to whom he is or has been married; nor shall he be permitted to disclose any such communication, unless the person who made it, or his representative in interest, consents, except in suits between married persons, or proceedings in which one married person is prosecuting for any crime committed against the other.

Evidence as to affairs of state.

123. No one shall be permitted to give any evidence derived from unpublished official records relating to any affairs of State, except with the permission of the officer at the head of the department concerned, who shall give or withhold such permission as he thinks fit.

Official communications.

124. No public officer shall be compelled to disclose communications made to him in official confidence, when he considers that the public interests would suffer by the disclosure.

Information as to commission of offences.

125. No Magistrate or Police officer shall be compelled to say whence he got any information as to the commission of any offence.

Professional communications.

126. No barrister, attorney, pleader or vakil, shall at any time be permitted, unless with his client's express consent, to disclose any communication

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made to him in the course and for the purpose of his employment as such barrister, pleader, attorney or vakil, by or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment, or to disclose any advice given by him to his client in the course and for the purpose of such employment:

Provided that nothing in this section shall protect from disclosure—

(1.) Any such communication made in furtherance of any *illegal* purpose;

(2.) Any fact observed by any barrister, pleader, attorney or vakil, in the course of his employment as such, showing that any crime or fraud has been committed since the commencement of his employment.

It is immaterial whether the attention of such barrister, *pleader*, attorney or vakil was or was not directed to such fact by or on behalf of his client.

Explanation.—The obligation stated in this section continues after the employment has ceased.

Illustrations.

(a.) A, a client, says to B, an attorney—"I have committed forgery and I wish you to defend me."

As the defence of a man known to be guilty is not a criminal purpose, this communication is protected from disclosure.

(b.) A, a client, says to B, an attorney—'I wish to obtain possession of property by the use of a forged deed on which I request you to sue.'

This communication, being made in furtherance of a criminal purpose, is not protected from disclosure.

(c.) A, being charged with embezzlement, retains B, an attorney, to defend him. In the course of the proceeding, B observes that an entry has been made in A's account-book, charging A with the sum said to have been embezzled, which entry was not in the book at the commencement of his employment.

This being a fact observed by B in the course of his employment, showing that a fraud has been committed since the commencement of the proceedings, it is not protected from disclosure.

Notes.

The words in italics indicate the changes made by s. 10 of Act XVIII of 1872, but the substitution of the word *illegal* for *criminal* has not been made in either of the illustrations.

To be privileged under this section a communication by a party to his attorney be of a confidential or private nature. Where defendants at an interview, at which the plaintiff was present, admitted their partnership to their attorney, who was then also acting as attorney for the plaintiff, it was *held* that the attorney was not precluded by this section from giving evidence of this admission to him: 1st because the defendants' statements having been made in presence and hearing of the plaintiff could not be regarded as *confidential or private*; 2nd, because these state-

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whose behalf the privilege is claimed, but not the nature of his employment—Evidence Act (I of 1872), Sec. 126—Evidence.] The law relating to professional communications between a solicitor and a client is the same in India as in England.

It is not every communication made by a client to an attorney that is privileged from disclosure. The privilege extends only to communications made to him confidentially, and with a view to obtaining professional advice.

Where a solicitor claims privilege under section 126 of the Indian Evidence Act (I of 1872), he is bound to disclose the name of his client, on whose behalf he claims the privilege. The mere fact that the client's name had been communicated to him in the course and for the purpose of his employment as solicitor by another client, affords no excuse, unless it was communicated to him confidentially, on the express understanding that it was not to be disclosed.

But a solicitor is not at liberty, without his client's express consent, to disclose the nature of his professional employment. Section 126 of the Indian Evidence Act protects from publicity not merely the details of the business, but also its general purport, unless it be known *aliunde* that such business falls within proviso I or II to the section.

At an interview between a solicitor and a client, the solicitor took down a certain statement made by a person named A. B. who was in his client's company, and whose name was communicated to him in the course and for the purpose of his professional employment. A.B. was afterwards tried for defamation, and the solicitor was examined by the prosecution with reference to the statement made to him by the accused at the above interview. The solicitor was asked whether the person who had made the statement had given his name as A. B. The solicitor declined to answer the question on the ground of privilege.

Held, that the solicitor was bound to answer the question, unless A. B.'s name was communicated to him by his client in confidence with a view to its not being disclosed.

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ments did not appear to have been made to the attorney *exclusively in his character of attorney* for the defendants but to have been addressed to him also as attorney for the plaintiffs. *Memon Hajee Haroon Mahomed v. Molvi Abdul Karim and Moola Ahmed, Moola Abdulla* (I. L. R., 3 Bom., 91.)

Section 126 to apply to interpreters, &c.

127. The provisions of section one hundred and twenty-six shall apply to interpreters, and the clerks or servants of barristers, pleaders, attorneys, and vakils.

Privilege not waived by volunteering evidence.

128. If any party to a suit gives evidence therein at his own instance or otherwise, he shall not be deemed to have consented thereby to such disclosure as is mentioned in section one hundred and twenty-six; and if any party to a suit or proceeding calls any such barrister, *pleader*, attorney or vakil as a witness, he shall be deemed to have consented to such disclosure only if he questions such barrister, attorney or vakil on matters which, but for such question, he would not be at liberty to disclose.

Note.

The word in italics has been added by s. 10 of Act XVIII of 1872.

Confidential communications with legal advisers.

129. No one shall be compelled to disclose to the Court any confidential communication which has taken place between him and his legal professional adviser, unless he offers himself as a witness, in which case he may be compelled to disclose any such communications as may appear to the Court necessary to be known in order to explain any evidence which he has given, but no others.

Notes.

With reference to this section the judgment of *West, J.*, in *Munchershaw Bezonji v. The New Dhurrumsey Spinning and Weaving Co.* (I. L. R., 4 Bom., 576), in which he reviews the English decisions on this point, will be found useful.

The plaintiff had submitted, in 1878, to Counsel a letter he had received from the agents expressly allowing him to take *Sookri* (a percentage on payments made by customers) together with a case for opinion upon matters connected with it. The Defendant's Counsel called for the production of the case submitted to Counsel, contending that his clients were entitled to have inspection of it under s. 130 of Act X of 1877, and that, although by s. 129 the case could not be disclosed *to the Court*, there was nothing in the latter section which forbade its disclosure to the opposite party. *West, J.*, said.—"The question here is as to the right construction of s. 129 of the Indian Evidence Act which is in these terms (reads the section.)

Relying on this Mr. Inverarity for the defendants calls on the plaintiff to produce a case laid by him before Counsel as to one of the matters now in question before the litigation had begun. He relies on *Radcliffe v. Fursman* (2 Brown's Parl, Ca. 514) and several cases in which that decision, though really disapproved, had been followed (see Taylor on Evidence s. 846), and contends that even though the Court may not be bound or disposed to order the production of the document in question as evidence, yet the defendants have a right to disclosure of it as likely to afford information of value to them for the purposes of the case.

In drawing up the Indian Evidence Act chiefly from Taylor on Evidence, Sir

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James Stephen plainly intended to adopt in s. 129 the principle contended for in sections 846 and 847 (s. 925 in the 7th edition), of the work he was condensing; but with this qualification, not expressed at that place, that if a party becomes a witness of his own accord, he shall, if the Court requires it, be made to disclose everything necessary to the true comprehension of his testimony. The narrow privilege recognised in *Radcliffe v. Fursman*, after being several times condemned as insufficient was definitely widened by *Bolton v. Corporation of Liverpool* (1 Ph., 91), *Herring v. Cloberry* (1 My. and K., 88) and *Lawrence v. Campbell* (4 Drew 485; see. p. 489;) in which *Kindersley*, V. C., lays down the principle of protection as founded on the exigencies of human affairs in the broadest terms. In *Pearse v. Pearse* (1 De. G. and Sm. 12) Knight-Bruce, V. C., refers *Radcliffe v. Fursman* to the principle that the advice was sought by the party pressed to disclose this case, not in his strictly personal character, but as a trustee, and in this state of the authorities the Indian Evidence Act was framed. *Wilson v. Northampton and Banbury Railway Co.* (L. R., 14 Eq. 477) had not then been decided by Malins, V. C. In that case it is said; "It is for the highest importance, as laid down in *Greenhough v. Gaskell* (1 My. and K., 98, 103) that all communications between a solicitor and client upon a subject which may lead to litigation should be privileged and I think the Court is bound to consider that .....almost any contract.....may lead to litigation before the contract is completed." And again, "All correspondence between solicitors and clients relating to the subject matter of a contract which has been entered into, and which may lead to litigation .....whether it has done so or may do so, whether it is probable or improbable that it may do so, ought certainly to be privileged." Judicial opinion on the point in question, having thus far ripened, the case of *Minet v. Morgan* (L. R., 8 Ch., 361) afforded to Lord Selborne an opportunity of settling the law in a wise and liberal sense. He adopts in the fullest extent the principles laid down by Kindersley V. C and Knight-Bruce V. C. Mellish, L. J., concurred with the Lord Chancellor, and the distinctions formerly taken, can now no longer be maintained.....

The argument that, albeit the document may not be such that the Court can properly order its production as evidence, yet the opposite party may demand a perusal of it, is I think, opposed to all principle. If a communication is protected by its confidential character, it is protected in an especial degree as against an adversary in litigation. The cases in the English Courts, indeed, deal chiefly with disclosures sought by an adverse party for the purpose of the suit. In *Smith v. Daniell* (L. R., 18 Eq. 649) the communications were not confidential.

Here the document which the plaintiff is asked to produce, is in its nature a confidential communication.

The plaintiff wanted advice for his personal guidance in fulfilling a contract of service. The statement which he laid before Counsel with this view, is his own property, in substance as well as form, it not being suggested that the consultation was in furtherance of any fraud. I do not find it necessary to compel a disclosure of it, in order to explain the evidence given by the plaintiff, and, in the absence of such necessity, it would be wrong to put pressure on the plaintiff.

It is obviously desirable that communications with professional advisers should be unembarrassed by any such fears as a contrary decision would give rise to. Cunning men would easily evade a rule which would make frank communications unsafe. Truthful men would be placed at a disadvantage by their candour. Advice would be given on maimed and distorted statements, and useless litigation would thus be promoted in numberless cases in which an exact knowledge of the facts would have enabled a counsel or solicitor to nip it in the bud by timely warning or suggestion. Lastly, a compulsory disclosure of confidential communications is so opposed to the popular conscience on that point, that it would lead to frequent falsehoods as to what had really taken place. The rule of protection seems to me to be one which should be construed in a sense most favourable to bringing professional knowledge to bear effectively on the facts out of which legal rights and obligations arise, and disclosures made under section 129 should not be enforced in any cases except where they are plainly necessary. I decline, therefore, to order the production of the paper."

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130. No witness, who is not a party to a suit, shall be compelled to produce his title-deeds to any property, or any document in virtue of which he holds any property as pledgee or mortgagee, or any document the production of which might tend to criminate him, unless he has agreed in writing to produce them with the person seeking the production of such deeds or some person through whom he claims.

Production of title deeds of witness not a party.

131. No one shall be compelled to produce documents in his possession, which any other person would be entitled to refuse to produce if they were in his possession, unless such last mentioned person consents to their production.

Production of documents which another person, having possession, could refuse to produce.

132. A witness shall not be excused from answering any question as to any matter relevant to the matter in issue in any suit or in any civil or criminal proceeding, upon the ground that the answer to such question will criminate, or may tend directly or indirectly to criminate, such witness, or that it will expose, or tend directly or indirectly to expose, such witness to a penalty or forfeiture of any kind:

Witness not excused from answering on ground that answer will criminate.

Provided that no such answer, which a witness shall be compelled to give, shall subject him to any arrest or prosecution, or be proved against him in any criminal proceeding, except a prosecution for giving false evidence by such answer.

Proviso.

Notes.

Although a person under examination as a witness is bound by his affirmation to tell the truth, if he is examined on a point on which he is likely to criminate himself, his position should be explained to him by the Magistrate, as otherwise he may be induced, through ignorance of the state of the law, to deny the existence of facts from fear of penal consequences. Although, without such a warning he may make a false denial and thereby become guilty of the offence of intentionally giving false evidence under s. 191 I. P. C. his offence will not be deserving of severe punishment. *Jaddoo Nath Dutt* (2 C. L. R., 181).

In a Small Cause suit under Chapter XXXIX of Act X of 1877 on a promissory note, which was alleged to have been executed jointly by G and his son V, V filed an affidavit in order to obtain leave to defend the suit, and, having obtained leave to defend, gave evidence at the trial on his own behalf.

On a subsequent trial of V for forgery of his father's signature to the same promissory note, the affidavit and deposition of V in the Small Cause suit were admitted as evidence against V.

Held by *Turner C. J.*, *Innes* and *Kindersley, J. J.*, that both the affidavit and the deposition were properly admitted.

Per *Kernan* and *Muttusami Ayyar, J. J.*—that the affidavit was properly admitted, but not the deposition.

Per *Turner, C. J.*, *Innes* and *Kindersley, JJ.*—Where an accused person has made a statement on oath voluntarily and without compulsion on the part of the

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Court to which the statement is made, such a statement, if relevant may be used against him on his trial on a criminal charge.

If a witness does not desire to have his answers used against him on a subsequent criminal charge, he must object to answer, although he may know beforehand that such objection, if the answer is relevant, is perfectly futile, so far as his duty to answer is concerned, and must be overruled. *Queen v. Gopal Doss and another.* (I. L. R., 3 Mad., 271).

Accomplice.

133. An accomplice shall be a competent witness against an accused person; and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice.

Note.

The cases cited under s. 114 with reference to convictions on the testimony of an accomplice should be consulted with reference to this section, which should be read in connexion with s. 114, ill. (*b*) and the two explanatory notes contained among the illustrations referring to that illustration.

Number of witnesses.

134. No particular number of witnesses shall in any case be required for the proof of any fact.

Notes.

A conviction upon the statement of a complainant only is lawful. *Kulum Mundul v. Bhowoni Prosad and others* (22 W. R., C.r, 32).

There is no rule in the Civil Procedure Code which gives the Court any discretion in the matter of refusing to issue summonses to witnesses who are called by the parties in a civil case, to prove any point in their case, or of refusing to examine as many of them as the parties please to examine.

The provisions relating to the summoning and attendance of witnesses in civil cases will be found in ss. 159 to 178 of Act XIV of 1882.

The Courts have power to issue commission to examine witnesses in certain cases and the sections regulating the exercise of that power are ss. 383 to 391 (both inclusive) of the same Act.

The rules relating to the issue of commissions to examine witnesses in criminal cases are contained in ss. 503 to 508 (both inclusive) of Act X of 1882.

If it be necessary to examine persons who are suffering imprisonment in Jail, Act XV of 1869 states how and when their attendance for the purpose of giving testimony can be procured.

The following provisions of the old and new Codes of Criminal Procedure (placed in parallel columns), it will be seen, do vest a very considerable discretion in Magistrates, in respect of the summoning and examination of witnesses in criminal trials.

ACT X OF 1872.	*ACT X OF* 1882.
192. The Magistrate may, at any stage of the proceedings, summon and examine any person whose evidence he considers essential to the inquiry, and recall and re-examine any person already examined.	208. The Magistrate shall, when the accused appears or is brought before him proceed to hear the complainant (if any), and take in manner hereinafter provided all such evidence as may be produced in support of the prosecution or in behalf of the accused, or as may be called for by the Magistrate.
351. Any Court or Magistrate may, at any stage of any proceeding, inquiry or trial, summon, in the manner provided by chapter XII (which relates to the issue of summonses) any witness or	If the complainant or officer conducting the prosecution, or the accused, applies to the Magistrate

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examine any person in attendance though not summoned as a witness, and it shall be its or his duty to do so if the evidence of such person appears essential to the just decision of the case.

200. The accused person shall be required at once (after charge has been framed and read and explained to him) to give in orally or in writing, a list of witnesses whom he wishes to be summoned to give evidence on his trial before the Court of Session or High Court.

The Magistrate may, if he thinks proper summon the persons so named to attend and give evidence at the inquiry; and if he does so, the commitment shall not be considered to have been made until such evidence has been taken.

It shall be in the discretion of the Magistrate; subject to the provisions of s. 359, to allow the accused person to give in any further list of witnesses at a subsequent time.

357. In inquiries preliminary to commitment to a Court of Session or High Court, the Magistrate shall procure the attendance of the witnesses for the prosecution as in cases usually tried upon warrant; and it shall be in his discretion to summon any witness offered on behalf of the accused person to answer or disprove the evidence against him. If the Magistrate refuses to summon a witness so offered he shall record his reasons for such refusal.

The Magistrate may summon and examine supplementary witnesses after commitment and before the commencement of the trial, and bind them over to appear and give evidence. Such examination shall, if possible, be taken in the presence of the accused person, and, in every case a

to issue process to compel the attendance of any witness or the production of any document or other thing, the Magistrate shall issue such process unless, for reasons to be recorded, he deems it unnecessary to do so.

Nothing in this section shall be deemed to require a Presidency Magistrate to record his reasons.

211. The accused shall be required at once (as soon as the charge has been framed, read and explained to him) to give in, orally or in writing a list of the persons (if any) whom he wishes to be summoned to give evidence on his trial.

The Magistrate may, in his discretion, allow the accused to give in any further list of witnesses at a subsequent time; and, where the accused is committed for trial before the High Court, nothing in this section shall be deemed to preclude the accused from giving, at any time before his trial, to the Clerk of the Crown a further list of the persons whom he wishes to be summoned to give evidence on such trial.

212. The Magistrate may, in his discretion, summon and examine any witness named in any list given in to him under s. 211.

213. When the accused, on being required to give in a list under s. 211, has declined to do so, or when he has given in such list and the witnesses (if any) included therein whom the Magistrate desires to examine have been summoned and examined under s. 212, the Magistrate may make an order committing the accused for trial by the High Court or the Court of Session (as the case may be) and (unless the Magistrate is a Presidency Magistrate) shall also record briefly the reasons for such commitment.

216. When the accused has given in any list of witnesses under s. 211 and has been committed for trial, the Magistrate shall summon such of the witnesses included in the list as have not appeared before himself, to appear before the Court to which

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copy of the examination of such witnesses shall be given him free of cost.

358. In such inquiries, when the person accused is to be committed for trial, and has given in the list of witnesses mentioned in S. 200, the Magistrate shall summon the witnesses to appear before the Court before which the accused person is to be tried.

359. If the Magistrate thinks that any witness is included in the list for the purpose of vexation or delay, or of defeating the ends of justice he may require the accused person to satisfy him that there are reasonable grounds for believing that such witness is material.

If the Magistrate be not so satisfied, he shall not be bound to summon the witness, but in doubtful cases he may summon such witness if such a sum is deposited with the Magistrate as he thinks necessary to defray the expense of obtaining the attendance of the witness.

362. In warrant cases, the Magistrate shall ascertain from the complainant or otherwise, the names of any persons who may be acquainted with the facts and circumstances of the case, and who are likely to give evidence for the prosecution, and shall summon such of them to give evidence before him as he thinks necessary.

The Magistrate shall also, subject to the provisions of s. 359 summon any witness and examine any evidence that may be offered, in behalf of the accused person, to answer or disprove the evidence against him, and may, for that purpose, at his discretion, adjourn the trial from time to time. If the Magistrate refuse to summon a witness named by the accused person, he shall record his reasons for such refusal, and the accused person shall be entitled to appeal to the Court of Session against such refusal.

N.B.—The Magistrate cannot however *discharge* the accused person "until the evidence of the accused has been committed.

Provided that where the accused has been committed to the High Court, the Magistrate may, in his discretion, leave such witnesses to be summoned by the Clerk of the Crown, and such witnesses may be summoned accordingly;

Provided also that if the Magistrate thinks that any witness is included in the list for the purpose of vexation or delay or of defeating the ends of justice, the Magistrate may require the accused to satisfy him that there are reasonable grounds for believing that the evidence of such witness is material, and, if he is not so satisfied, may refuse to summon the witness (recording his reasons for such refusal), or may, before summoning him, require such sum to be deposited as such Magistrate thinks necessary to defray the expense of obtaining the attendance of the witness.

252. When the accused appears or is brought before a Magistrate, such Magistrate shall proceed to hear the complainant (if any) and take all such evidence as may be produced in support of the prosecution.

The Magistrate shall ascertain, from the complainant or otherwise, the names of any persons likely to be acquainted with the facts of the case and to be able to give evidence for the prosecution, and shall summon to give evidence before himself such of them as he thinks necessary.

257. If the accused applies to the Magistrate to issue any process for compelling the attendance of any witness (whether he has or has not been previously examined in the case) for the purposes of examination or cross-examination or the production of any document or other thing, the Magistrate shall issue such process unless he considers that such application should be refused on the ground that it is made for the

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witnesses named for the prosecution has been taken." S. 215, expl. III.

purpose of vexation or delay, or for defeating the ends of justice. Such ground shall be recorded by him in writing.

The Magistrate may, before summoning any witness on such application, require that his reasonable expenses incurred in attending for the purposes of the trial be deposited in Court.

363. The accused person shall be allowed to examine any witness not previously named by him, if such witness be in attendance; but he shall not, except as provided in s. 448, be entitled of right to have any witness summoned other than the witnesses named in the list delivered to the Magistrate by whom he was committed or held to bail for trial.

[S. 448 relates to an amendment or alteration of the charge which, in the opinion of the Court, is such that proceeding immediately with the trial is likely to prejudice the accused person in his defence.]

291. The accused shall be allowed to examine any witness not previously named by him, if such witness is in attendance; but he shall not, except as provided in sections 211 and 231, be entitled of right to have any witness summoned, other than the witnesses named in the list delivered to the Magistrate by whom he was committed for trial.

[S. 231 allows the prosecution and the accused to recall or resummon and examine, with reference to the alteration made in the charge by the Court, any witness who may have been examined.]

361. In summons cases, the Magistrate may summon any person who appears to him likely to give material evidence on behalf of the complainant or the accused.

Ordinarily it shall be the duty of the complainant and accused, in non-cognizable cases, to produce their own witnesses.

In such cases, it shall be in the discretion of the Magistrate to summon any witnesses named by the complainant or the accused; and he may require, in such cases, a deposit of the expenses of a witness before summoning him.

244. If the accused does not make such admission (of guilt) the Magistrate shall proceed to hear the complainant (if any) and take all such evidence as may be produced in support of the prosecution, and also to hear the accused and take all such evidence as he produces in his defence.

The Magistrate may, if he think fit, on the application of the complainant or accused, issue process to compel the attendance of any witness or the production of any document or other thing.

The Magistrate may, before summoning any witness on such application, require that his reasonable expenses, incurred in attending for the purposes of the trial be deposited in Court.

226. In trials under this Chapter (XVIII relating to summary trials) the provisions of this Code in regard to summons cases shall be followed in respect of summons cases, and the procedure for warrant cases in respect of warrant cases, with the exceptions hereinafter provided.

262. In trials under this Chapter, (XXII, relating to summary trials) the procedure prescribed for summons cases shall be followed in summons cases, and the procedure prescribed for warrant cases shall be followed in warrant cases, except as hereinafter mentioned.

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CHAPTER X.

OF THE EXAMINATION OF WITNESSES.

Order of production and examination of witnesses.

135. The order in which witnesses are produced and examined shall be regulated by the law and practice for the time being relating to civil and criminal procedure respectively, and in the absence of any such law, by the discretion of the Court.

Notes.

The rules as to the order in which witnesses in civil cases are to be produced and examined will be found in ss. 179 and 180 of Act XIV of 1882.

The rules as to the order in which witnesses in criminal cases are to be produced and examined will be found in the sections, which appear in the notes to the last preceding section.

Judge to decide as to admissibility of evidence.

136. When either party proposes to give evidence of any fact, the Judge may ask the party proposing to give the evidence in what manner the alleged fact, if proved, would be relevant; and the Judge shall admit the evidence if he thinks that the fact, if proved, would be relevant, and not otherwise.

If the fact proposed to be proved is one of which evidence is admissible only upon proof of some other fact, such last-mentioned fact must be proved before evidence is given of the fact first mentioned, unless the party undertakes to give proof of such fact and the Court is satisfied with such undertaking.

If the relevancy of one alleged fact depends upon another alleged fact being first proved, the Judge may, in his discretion, either permit evidence of the first fact to be given before the second fact is proved, or require evidence to be given of the second fact before evidence is given of the first fact.

Illustrations.

(*a.*) It is proposed to prove a statement about a relevant fact by a person alleged to be dead, which statement is relevant under section thirty-two.

The fact that the person is dead must be proved by the person proposing to prove the statement, before evidence is given of the statement.

(*b.*) It is proposed to prove, by a copy, the contents of a document said to be lost.

The fact that the original is lost must be proved by the person proposing to produce the copy, before the copy is produced.

(*c.*) A is accused of receiving stolen property knowing it to have been stolen.

It is proposed to prove that he denied the possession of the property.

The relevancy of the denial depends on the identity of the property.

The Court may, in its discretion, either require the property to be identified before the denial of the possession is proved, or permit the denial of the possession to be proved before the property is identified.

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(*d.*) It is proposed to prove a fact (A) which is said to have been the cause or effect of a fact in issue. There are several intermediate facts (B, C, and D) which must be shown to exist before the fact (A) can be regarded as the cause or effect of the fact in issue. The Court may either permit A to be proved before B, C or D is proved, or may require proof of B, C and D before permitting proof of A.

Examination-in-chief.

137. The examination of a witness by the party who calls him shall be called his examination-in-chief.

Cross-examination.

The examination of a witness by the adverse party shall be called his cross-examination.

Re-examination.

The examination of a witness, subsequent to the cross-examination, by the party who called him, shall be called his re-examination.

Order of examinations.

138. Witnesses shall be first examined-in-chief, then (if the adverse party so desires) cross-examined, then (if the party calling him so desires) re-examined.

The examination and cross-examination must relate to relevant facts, but the cross examination need not be confined to the facts to which the witness testified on his examination-in-chief.

Direction of re-examination.

The re-examination shall be directed to the explanation of matters referred to in cross-examination; and if new matter is, by permission of the Court, introduced in re-examination, the adverse party may further cross-examine upon that matter.

Notes.

In one case a Sessions Judge, on the examination-in-chief being finished, questioned nearly all the witnesses at considerable length upon the very points to which he must have known that the cross-examination would certainly and properly be directed. The High Court pointed out that this was irregular, opposed to the provisions of this section and not quite fair to the prisoners. The result of it was to render the cross-examination by the prisoners' pleaders to a great extent ineffective, by assisting the witnesses to explain away in anticipation the points which might have afforded proper ground for useful cross-examination.

It is not the province of the Court to examine the witnesses, unless the pleaders on either side have omitted to put some material question or questions; and the Court should, as a general rule, leave the witnesses to the pleaders to be dealt with as laid down in this section. The Judge's power to put questions under section 165 was not intended to be used in the manner which the High Court had occasion to notice in the present case. *In the matter of Noor Bux Kazi, Shaikh Toyab and Jamir Mundle* (7. C. L. R., 385; I. L. R., 6 Cal., 279).

The following decisions bearing upon the right of accused persons to recall and cross-examine witnesses for the prosecution after charge has been framed will prove useful to the profession and also to the Criminal Courts.

A Magistrate cannot refuse to allow witnesses, whom he allowed to be cross-examined by the accused previous to the preparation of a charge, to be recalled and cross-examined after the accused has been put upon his defence under s. 252 of Act XXV of 1861 (corresponding with s. 218 of Act X of 1872), treating them *as witnesses for the prosecution. Thakoor Doyal Sen* (17 W. R., Cr., 51).

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When a charge has been framed and the defendant put on his defence, he has a right, under s. 218 of Act X of 1872 to have the prosecutor's witnesses recalled for the purpose of cross-examination, even though he simply pleads "not guilty."

The claim to recall the witnesses for the prosecution is very different from the request made by the accused to summon a witness under s. 362 of the same Act.

No appeal lies to the Sessions Court from the order of the Magistrate refusing to recall the witnesses for the prosecution for the purpose of cross-examination, but the order is such an error as cannot be immediately corrected except by the interposition of the High Court under its powers of Superintendence and Revision. *J.R. Belilios* (19 W. R., Cr., 53).

Under s. 218 a Magistrate is not competent to refuse to recall the witnesses for the prosecution to be cross-examined by the accused, and it is not necessary for the accused to show that he has reasonable grounds for his application. *Queen v. Amiruddin Fakir* (21 W. R., Cr., 29).

A prisoner originally charged with an offence under s. 302 I.P.C. and acquitted of that charge, was committed the day following that on which she was acquitted for trial, without any witnesses being examined, on a charge under s. 307 and without having any opportunity of cross-examining the witnesses on the first charge with respect to the second charge. *Held* that the irregularity was one which was not covered by s. 283 of Act X of 1872, and that the prisoner had been prejudiced thereby in her defence. The trial under s. 307 was accordingly quashed and a new trial ordered. *Queen v. Mussamat Itwarya* (22 W. R. Cr., 14).

As a rule the correct and proper time for the purpose of cross-examination of the witnesses for the prosecution is at the commencement of the accused person's defence; but it is in the discretion of the Court to allow the accused to recall and cross-examine the witnesses for the prosecution at any period of the defence, when the Court may think such a step right and proper.

It is incumbent upon the Court, when it discharges a witness from the duty of attendance before the trial is ended, to ascertain from the accused whether he has or is likely to have any need of the witness's testimony; and if he has such need, then to take such steps for insuring the presence of the witness at the required time as may be necessary. *Khurruckdharee Singh* (22 W. R., Cr., 44).

In a warrant case, the accused is entitled to recall and cross-examine prosecution witnesses, as expressly provided by s. 218 of Act X of 1872, even though he had, previously to the charge being drawn up, already cross-examined them; and in a case in which this right was refused by the Magistrate, and more than half of the imprisonment ordered had been suffered, the High Court refused to order a new trial but recorded an order of acquittal. *Nobin Chand Banerjea and another* (25 W. R., Cr., 32).

When certain accused persons, who were convicted of using criminal force, had not been allowed to recall and cross-examine the witnesses for the prosecution, because the trying officer believed that such witnesses could only be recalled immediately after the framing of the charge.—*Held* that accused persons *always* had a right to recall prosecution witnesses which ceased *only when they themselves waived it*; that Magistrates could obviate all inconvenience to witnesses by asking accused persons, on the drawing up of charges whether they required the further attendance of the witnesses. In this case the prisoners having suffered the entire punishment the convictions were quashed. *Queen v. Ram Kishun Halwai and others* (25 W. R., Cr. 48).

In one case, on the 17th December 1880, the charge was drawn up and the Magistrate made this order "To-day having heard the pleaders and mooktears, the case will stand over until to-morrow." The next day the accused applied to recall and cross-examine the complainant and his witnesses. The Magistrate passed an order that the matter should be brought up on the following day for orders. On the 20th, one of the witnesses for the prosecution, the constable who investigated the case, appeared before the Court and the Magistrate, at the request of the Head Constable, directed the Mooktear of the accused to cross-examine him on that day in order to avoid the inconvenience of the Constable having to appear an another day. The mooktear declined to cross-examine him on that day on the ground that he was not prepared to do so, as the pleader of the accused was not present, and also because it

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might prejudice the defence if all the witnesses were not brought up at once for cross-examination, and by a petition of the 20th idem he asked that some future day might be fixed for the cross-examination.

The Court *held*, under these circumstances, that the right of an accused person to recall and cross-examine the witnesses of the prosecution under s. 218 of Act X of 1872, must be exercised at the time when the charge is read and explained to him under the preceding section, and if not exercised at that time, it cannot afterwards be insisted on although it is in the discretion of the Magistrate to recall the witnesses, if he think fit. *Sheikh Faiz Ali and others* (8 C. L. R., 325 ; I. L., R. 7 Cal.,28).

In the trial of warrant cases the accused may, after the charge is drawn up and the witnesses for the defence have been examined recall and cross-examine the witnesses for the prosecution, unless he had previously expressly abandoned his right to do so. *Talluri Venkayya v. Queen* (I. L. R., 4 Mad., 130).

In *Empress v. Baldeo Sahai* (I. L. R., 2 All., 253) *Spankie, J.*, said, "The plain meaning and intention of this section was to allow him (the accused) the right in question (to recall and cross-examine the witnesses for the prosecution) at any time while he is engaged in his defence and before his trial is concluded. The object of the section is clearly to secure the accused the opportunity of cross-examining the witnesses for the prosecution *after* he has been informed as to the nature of the specific charge which he is required to answer. Until he knows this he is not in a position to decide in what points the evidence for the prosecution is material. If this opportunity be secured, I do not apprehend that he has any further right of recalling the witnesses. If the witnesses for the defence are in attendance they are to be examined, and after that the accused shall be allowed to recall and cross-examine the witnesses for the prosecution. But if the witnesses for the defence were not in attendance, the accused would still be at liberty to recall the witnesses for the prosecution. If he refuses to exercise this right *after he has entered on his defence*, he cannot, I think, demand as a right the recall of the witnesses for the prosecution, if the case be adjourned because he has not produced his witnesses. He has had the opportunity intended by this section. What his own witnesses may say can have little or no bearing on the cross-examination of the witnesses for the prosecution who are called to support the charge, but not to refute the evidence for the defence."

Sections 255 and 256 of Act X of 1882 will replace sections 217 and 218 of Act X of 1872 and are here placed in parallel columns so that they may be the more readily compared.

ACT X. OF 1872.	*ACT X. OF* 1882.
217. The charge shall then be read and explained to the accused person, and he shall be asked whether he is guilty or has any defence to make.	255. The charge shall then be read and explained to the accused, and he shall be asked whether he is guilty or has any defence to make. If the accused pleads guilty, the Magistrate shall record the plea, and may in his discretion convict him thereon.
218. If the accused person have any defence to make to the charge, he shall be called upon to enter upon the same, and to produce his witnesses if in attendance, and shall be allowed to recall and cross-examine the witnesses for the prosecution. If the accused person puts in any written statement, the Magistrate may file it with the record, but shall not be bound to do so.	256. If the accused refuses to plead or does not plead or claims to be tried, he shall be called upon to enter upon his defence and to produce his evidence and shall, at any time while he is making his defence, be allowed to recall and cross-examine any witness for the prosecution present in Court or its precincts. If the accused puts in any written statement, the Magistrate shall file it with the record. *N. B.*—The accused has, under the next section, which has been set forth

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in the notes to s. 134 (ante p. 102) the right to apply to the Magistrate to issue process for compelling the attendance of any witness, whether previously examined or not, for the purposes of examination or cross-examination.

Cross-examination of person called to produce a document.

139. A person summoned to produce a document does not become a witness by the mere fact that he produces it, and cannot be cross-examined unless and until he is called as a witness.

Witnesses to character.

140. Witnesses to character may be cross-examined and re-examined.

Leading questions.

141. Any question suggesting the answer, which the person putting it wishes or expects to receive, is called a leading question.

When they must not be asked.

142. Leading questions must not, if objected to by the adverse party, be asked in an examination-in-chief, or in a re-examination, except with the permission of the Court.

The Court shall permit leading questions as to matters which are introductory or undisputed; or which have, in its opinion, been already sufficiently proved.

When they may be asked.

143. Leading questions may be asked in cross-examination.

Evidence as to matters in writing.

144. Any witness may be asked whilst under examination, whether any contract, grant or other disposition of property, as to which he is giving evidence was not contained in a document, and if he says that it was, or if he is about to make any statement as to the contents of any document, which in the opinion of the Court, ought to be produced, the adverse party may object to such evidence being given until such document is produced, or until facts have been proved which entitle the party who called the witness to give secondary evidence of it.

Explanation.—A witness may give oral evidence of statements made by other persons about the contents of documents if such statements are in themselves relevant facts.

Illustration.

The question is, whether A assaulted B, C deposes that he heard A say to D—'B wrote a letter accusing me of theft, and I will be revenged on him.' This statement is relevant, as showing A's motive for the assault and evidence may be given of it, though no other evidence is given about the letter.

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Cross-examination as to previous statements in writing.

145. A witness may be cross-examined as to previous statements made by him in writing or reduced into writing, and relevant to matters in question, without such writing being shown to him, or being proved; but if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him.

Note.

In *Munchershaw Bezonji v. The New Dhurrumsey Spinning and Weaving Company* (I. L. R., 4 Bom., 576) it appeared that A was employed by B at intervals of a week or fortnight to write up B's account books, B furnishing him with the necessary information either orally or from loose memoranda. *Held* that the entries so made could not be given in evidence to contradict A under this section as previous statements made by him in writing. The statements were really made, not by A but by B, under whose instructions A had written them.

Questions lawful in cross-examination.

146. When a witness is cross-examined, he may, in addition to the questions hereinbefore referred to, be asked any questions which tend

(1.) to test his veracity;

(2.) to discover who he is and what is his position in life, or

(3.) to shake his credit, by injuring his character, although the answer to such questions might tend directly or indirectly to criminate him, or might expose or tend directly or indirectly to expose him to a penalty or forfeiture.

When witness to be compelled to answer.

147. If any such question relates to a matter relevant to the suit or proceeding, the provisions of section one hundred and thirty-two shall apply thereto.

Court to decide when question shall be asked and when witness compelled to answer.

148. If any such question relates to a matter not relevant to the suit or proceeding except in so far as it affects the credit of the witness by injuring his character, the Court shall decide whether or not the witness shall be compelled to answer it, and may, if it thinks fit, warn the witness that he is not obliged to answer it. In exercising its discretion, the Court shall have regard to the following considerations:—

(1.) Such questions are proper if they are of such a nature that the truth of the imputation conveyed by them would seriously affect the opinion of the Court as to the credibility of the witness on the matter to which he testifies:

(2.) Such questions are improper if the imputation which they convey relates to matters so remote in time, or of such a character, that the truth of the imputation would not affect, or would affect in a slight degree, the opinion of the Court as to the credibility of the witness on the matter to which he testifies:

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(3.) Such questions are improper if there is a great disproportion between the importance of the imputation made against the witness's character and the importance of his evidence:

(4.) The Court may, if it sees fit, draw, from the witness's refusal to answer, the inference that the answer if given would be unfavourable.

Question not to be asked without reasonable grounds.

149. No such question, as is referred to in section one hundred and forty-eight, ought to be asked, unless the person asking it has reasonable grounds for thinking that the imputation, which it conveys, is well founded.

Illustrations.

(a.) A barrister is instructed by an attorney or vakil that an important witness is a dakait. This is a reasonable ground for asking the witness whether he is a dakait.

(b.) A pleader is informed by a person in Court that an important witness is a dakait. The informant, on being questioned by the pleader, gives satisfactory reasons for his statement. This is a reasonable ground for asking the witness whether he is a dakait.

(c.) A witness, of whom nothing whatever is known, is asked at random whether he is a dakait. There are here no reasonable grounds for the question.

(d.) A witness, of whom nothing whatever is known, being questioned as to his mode of life and means of living, gives unsatisfactory answers. This may be a reasonable ground for asking him if he is a dakait.

Procedure of Court in case of question being asked without reasonable grounds.

150. If the Court is of opinion that any such question was asked without reasonable grounds, it may, if it was asked by any barrister, pleader, vakil or attorney, report the circumstances of the case to the High Court or other authority to which such barrister, pleader, vakil or attorney is subject in the exercise of his profession.

Indecent and scandalous questions.

151. The Court may forbid any questions or inquiries which it regards as indecent or scandalous, although such questions or inquiries may have some bearing on the questions before the Court, unless they relate to facts in issue, or to matters necessary to be known in order to determine whether or not the facts in issue existed.

Questions intended to insult or annoy.

152. The Court shall forbid any question which appears to it to be intended to insult or annoy, or which, though proper in itself, appears to the Court needlessly offensive in form.

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153. When a witness has been asked and has answered any question which is relevant to the inquiry only in so far as it tends to shake his credit by injuring his character, no evidence shall be given to contradict him; but if he answers falsely, he may afterwards be charged with giving false evidence.

Exclusion of evidence to contradict answers to questions testing veracity.

Exception 1.—If a witness is asked whether he has been previously convicted of any crime and denies it, evidence may be given of his previous conviction.

Exception 2.—If a witness is asked any question tending to impeach his impartiality, and answers it by denying the facts suggested, he may be contradicted.

Illustrations.

(*a.*) A claim against an underwriter is resisted on the ground of fraud.

The claimant is asked whether in a former transaction, he had not made a fraudulent claim. He denies it. Evidence is offered to show that he did make such a claim

The evidence is inadmissible.

(*b.*) A witness is asked whether he was not dismissed from a situation for dishonesty. He denies it.

Evidence is offered to show that he was dismissed for dishonesty.

The evidence is not admissible.

(*c.*) A affirms that on a certain day he saw B at Lahore. A is asked whether he himself was not on that day at Calcutta. He denies it.

Evidence is offered to show that A was on that day at Calcutta.

The evidence is admissible, not as contradicting A on a fact which affects his credit, but as contradicting the alleged fact that B was seen on the day in question in Lahore.

In each of these cases the witness might, if his denial was false, be charged with giving false evidence.

(*d.*) A is asked whether his family has not had a blood feud with the family of B against whom he gives evidence.

He denies it. He may be contradicted on the ground that the question tends to impeach his impartiality.

Notes.

If a man deny having made a promissory note, and the fact whether he had or not is relevant to the trial only in so far as it might affect his credit, no contradiction of his statement could, according to the principle of this section, in strictness be received. *Reg. v. Parbhudas Ambaram and others* (11 Bom., H. C. R., 90).

In *Reg. v. Sakharam Mukundji and three others* (11 Bom. H. C. R., 166). Evidence was held to be admissible to prove that two witnesses for the prosecution were at Dhond till the afternoon of the day of the fire and to show that it was highly improbable that they should have left Dhond at about 11 A. M. or noon, and therefore highly improbable that the accused should have been seen by them at Wahle, as they asserted at 1 P. M. The case was like that in ill. (c) to this section, which shows that the admissibility of the testimony does not depend on the cross-examination of the witnesses to be contradicted.

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Question by party to his own witness.

154. The Court may, in its discretion, permit the person who calls a witness to put any questions to him which might be put in cross-examination by the adverse party.

Impeaching credit of witness.

155. The credit of a witness may be impeached in the following ways by the adverse party, or, with the consent of the Court, by the party who calls him :—

(1.) By the evidence of persons who testify that they, from their knowledge of the witness, believe him to be unworthy of credit;

(2.) By proof that the witness has been bribed, or has *accepted* the offer of a bribe, or has received any other corrupt inducement to give his evidence;

(3.) By proof of former statements inconsistent with any part of his evidence which is liable to be contradicted;

(4.) When a man is prosecuted for rape or an attempt to ravish, it may be shown that the prosecutrix was of generally immoral character.

Explanation.—A witness declaring another witness to be unworthy of credit may not, upon his examination-in-chief, give reasons for his belief, but he may be asked his reasons in cross-examination, and the answers which he gives cannot be contradicted, though, if they are false, he may afterwards be charged with giving false evidence.

Illustrations.

(*a.*) A sues B for the price of goods sold and delivered to B. C says that he delivered the goods to B.

Evidence is offered to show that, on a previous occasion, he said that he had not delivered the goods to B.

The evidence is admissible.

(*b.*) A is indicted for the murder of B.

C says that B, when dying, declared that A had given the B wound of which he died.

Evidence is offered to show that, on a previous occasion, C said that the wound was not given by A or in his presence.

The evidence is admissible.

Notes.

The word in italics indicates the change made in this section by section 11 of Act XVIII of 1872.

The rule of English Law on this point is that the credit of a witness may, amongst other ways, be impeached by evidence of facts, contradictory of the evidence given by him. The express provision of the Indian law is less extensive. The witness's credit, it is provided, can only be impeached in certain specified ways, that is, by questions or by testimony going directly to his credit, not mediately through a contradiction of the particular matter deposed to by him in the case. *Reg. v. Sakharam Mukundji and three others* (11 Bom. H. C. R., 166).

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156. When a witness whom it is intended to corroborate gives evidence of any relevant fact, he may be questioned as to any other circumstances which he observed at or near to the time or place at which such relevant fact occurred, if the Court is of opinion that such circumstances, if proved, would corroborate the testimony of the witness as to the relevant fact which he testifies.

Questions tending to corroborate evidence of relevant fact admissible.

Illustration.

A, an accomplice, gives an account of a robbery in which he took part. He describes various incidents unconnected with the robbery which occurred on his way to and from the place where it was committed.

Independent evidence of these facts may be given in order to corroborate his evidence as to the robbery itself.

157. In order to corroborate the testimony of a witness, any former statement made by such witness relating to the same fact, at or about the time when the fact took place, or before any authority legally competent to investigate the fact, may be proved.

Former statements of witness may be proved to corroborate later testimony as to same fact.

Note.

Former statements made by an accomplice to his parents and to police officers shortly after a murder cannot be used under this section to corroborate his testimony though they may be consistent with it. *Reg. v. Malapa bin Kapana and others* (11 Bom. H. C. R., 196).

158. Whenever any statement, relevant under section thirty-two or thirty-three, is proved, all matters may be proved, either in order to contradict or to corroborate it, or in order to impeach or confirm the credit of the person by whom it was made, which might have been proved if that person had been called as a witness and had denied upon cross-examination the truth of the matter suggested.

What matters may be proved in connection with proved statement relevant under section 32 or 33.

159. A witness may, while under examination, refresh his memory by referring to any writing made by himself at the time of the transaction concerning which he is questioned, or so soon afterwards that the Court considers it likely that the transaction was at that time fresh in his memory.

Refreshing memory.

The witness may also refer to any such writing made by any other person, and read by the witness within the time aforesaid, if when he read it he knew it to be correct.

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Whenever a witness may refresh his memory by reference to any document, he may, with the permission of the Court, refer to a copy of such document: Provided the Court be satisfied that there is sufficient reason for the non-production of the original.

When witness may use copy of document to refresh memory.

An expert may refresh his memory by reference to professional treatises.

Notes.

Section 119 of Act X of 1872 not making it obligatory upon a police officer to reduce to writing any statements made to him during an investigation, neither that section nor section 91 of this Act renders oral evidence of such statements inadmissible. If the statements be actually reduced to writing, the writing itself cannot be treated as part of the record or used as evidence but may be used for the purpose of refreshing the memory under the present section. Consequently, the person making the statements may properly be questioned about them; and, with a view to impeach his credit, the police officer himself or any other person in whose hearing the statements were made, can be examined on the point under s. 155. *Reg. v. Uttam Chand Kapur Chand and others* (11 Bom H, C. R. 120).

The plaints and records in a number of suits upon bonds instituted by the same plaintiff against different persons were destroyed by fire. The suits were reinstituted and duplicate copies of the plaints were filed. The only evidence of the execution of the bonds from which the plaints were prepared, consisted of a register kept by the plaintiff's gomastas, in which the names of the executants, the quantity of rice lent to them, its price, the instalments in which the price was to be paid and the names of the attesting witnesses to the bonds were entered in tabular form. *Held* that, though the register was not secondary evidence of the contents of the bonds, yet it was a document which might be referred to by a witness for the purpose of refreshing his memory under this section; and if so he might be able by the aid of the register to give evidence both as to the execution and contents of the bonds upon which the Court could act and pass a decree in favour of the plaintiff. *Taruck Nath Mullick v. Jeamat Nosya.* (I. L. R., 5 Cal., 353).

A prisoner has no right to insist that a police diary, if not in Court, shall be sent for, or, if it be in Court, that it be referred to for the purpose of refreshing the memory of a police officer under examination.

Per *Wilson J.*:—A witness cannot be compelled to refresh his memory from any document unless the document is either in the possession of the party who desires to put it to the witness, or is at least such as he can insist on having produced.

Wilson, J., also approved of the case *Uttamchand* and *Kapurchand* (11 Bom., H. C. R., 120) above cited and explained it thus: "what was decided in that case was this, that when a witness comes forward at a trial and makes a statement contradicting his statements previously made to the police, the accused or his pleader is entitled to cross-examine him with respect to his former statement; that if he desires it he may be contradicted; and that one of the ways in which he may be contradicted is by calling the police officer before whom he made the statement who may refresh his memory from his diary. *Kalicharan Chunari* (10 C. L. R., 51.)

160. A witness may also testify to facts mentioned in any such document as is mentioned in section one hundred and fifty-nine, although he has no specific recollection of the facts themselves if he is sure that the facts were correctly recorded in the document.

Testimony to facts stated in document mentioned in section 159.

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Illustration.

A book-keeper may testify to facts recorded by him in books regularly kept in the course of business, if he knows that the books were correctly kept, although he has forgotten the particular transactions entered.

Right of adverse party as to writing used to refresh memory.

161. Any writing referred to under the provisions of the two last preceding sections must be produced and shown to the adverse party if he requires it; such party may, if he pleases, cross-examine the witness thereupon.

Production of documents.

162. A witness summoned to produce a document shall, if it is in his possession or power, bring it to Court, notwithstanding any objection which there may be to its production or to its admissibility. The validity of any such objection shall be decided on by the Court.

The Court, if it sees fit, may inspect the document, unless it refers to matters of state, or take other evidence to enable it to determine on its admissibility.

Translation of documents.

If for such a purpose it is necessary to cause any document to be translated, the Court may, if it thinks fit, direct the translator to keep the contents secret unless the document is to be given in evidence: and if the interpreter disobeys such direction, he shall be held to have committed an offence under section one hundred and sixty-six of the Indian Penal Code.

Document called for and produced on notice, must be given as evidence under certain circumstances.

163. When a party calls for a document which he has given the other party notice to produce, and such document is produced and inspected by the party calling for its production he is bound to give it as evidence if the party producing it requires him to do so.

Using as evidence document production of which was refused on notice.

164. When a party refuses to produce a document which he has had notice to produce, he cannot afterwards use the document as evidence without the consent of the other party or the order of the Court.

Illustration.

A sues B on an agreement and gives B notice to produce it. At the trial, A calls for the document and B refuses to produce it. A gives secondary evidence of its contents. B seeks to produce the document itself to contradict the secondary evidence given by A, or in order to show that the agreement is not stamped. He cannot do so.

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Judge's power to put questions or order production.

165. The Judge may, in order to discover or to obtain proper proof of relevant facts, ask any question he pleases, in any form, at any time, of any witness, or of the parties, about any fact relevant or irrelevant; and may order the production of any document or thing: and neither the parties nor their agents shall be entitled to make any objection to any such question or order, nor, without the leave of the Court, to cross-examine, any witness upon any answer given in reply to any such question.

Provided that the judgment must be based upon facts declared by this Act to be relevant, and duly proved.

Provided also that this section shall not authorize any Judge to compel any witness to answer any question, or to produce any document which such witness would be entitled to refuse to answer or produce under sections one hundred and twenty-one to one hundred and thirty-one both inclusive, if the question were asked or the document were called for by the adverse party; nor shall the Judge ask any question which it would be improper for any other person to ask under sections one hundred and forty-eight or one hundred and forty-nine; nor shall he dispense with primary evidence of any document, except in the cases hereinbefore excepted.

Notes.

In *Reg v. Sakharam Mukundji and three others* (11 Bom H. C. R., 166). *West, J.*, said "when the Counsel for the prisoner has examined or declined to cross-examine a witness, and the Court afterwards, of its own motion, examined him, the witness cannot then, without the permission of the Court, be subjected to cross-examination. When, after the examination of a witness by the complainant and the defendant, the Court takes him in hand, he is put under special pressure as the Judge is empowered to ask any question he pleases, in any form about any fact relevant or irrelevant; and he is, therefore at the same time placed under the special protection of the Court, which may, at its discretion, allow a party to cross-examine him but this cannot be asked for as a matter of right.

This principle applies equally whether it is intended to direct the examination to the witness's statements of fact, or to circumstances touching his credibility, for any question meant to impair his credit tends (or is so designed) to get rid of the effect of all his answers and of each of them just as much as one that may bring out an inconsistency or contradiction. It is then a cross-examination upon answers, upon every answer given to the Court and is subject to the Court's control."

In the case of the *Empress v. Grish Chunder Talukdar* (I. L. R., 5 Cal., 614) *Jackson, J., held* that where the Judge thought it necessary to call one of the witnesses for the prosecution (who was examined by theMagistrate in the enquiry which preceded the committal of the case to the Sessions Court and was not called at the Sessions trial nor offered for cross-examination by the accused) for the purpose of eliciting some facts which he thought material for the prosecution, the prisoner ought to have been allowed an opportunity of putting any question that he thought necessary in cross-examination.

See case *Noor Bux Kazi, Sheik Toyal* and *Jamir Mundle* (7 C. L. R., 385; I. L. R., 6 Cal., 279), quoted in notes to section 138 (ante p. 105).

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166. In cases tried by jury or with assessors, the jury or assessors may put any questions to the witnesses, through or by leave of the Judge, which the Judge himself might put and which he considers proper.

Power of Jury or Assessors to put questions.

CHAPTER XI.

OF IMPROPER ADMISSION AND REJECTION OF EVIDENCE.

167. The improper admission or rejection of evidence shall not be ground of itself for a new trial or reversal of any decision in any case, if it shall appear to the Court before which such objection is raised that, independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision, or that, if the rejected evidence had been received, it ought not to have varied the decision.

No new trial for improper admission or rejection of evidence.

Notes.

Where a copy of a deposition is improperly admitted, such admission is not ground of itself for a new trial, if independently of the evidence so admitted, there is sufficient evidence to justify the decision. *Wooma Kant Bukshee v. Ganga Narain Chowdhry and others* (20 W. R., 384).

This section applies to criminal as well as civil cases; and it is for the Court of Sessions to decide whether there is evidence enough apart from any irregularity, to convict an accused person. *Queen v. Hurrybole Ghose* (25 W. R., Cr., 36; I. L. R., 1 Cal., 207).

In *Pitamber Jina's* case (I. L. R. 2 Bom., 61) *Westropp, C. J.*, was clearly of opinion that this section is applicable to criminal as well as to civil cases, and is so to criminal cases, whether or not the trial has been had before a jury; and that the expression in this section "the Court before which such objection is raised" includes the reviewing or appellate Court. That this section applies to criminal as well as to Civil Courts was, his Lordship thought, satisfactorily established by the 1st section, which renders the Act applicable to "all judicial proceedings in or before any Court including Courts martial," with certain exceptions not material in this case; and by the 3rd section which declares that the word Court includes all Judges and Magistrates.

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SCHEDULE.

ENACTMENTS REPEALED.

(See Section 2.)

Number and year.	Title.	Extent of repeal.
Stat. 26, Geo. III., Cap. 57.	For the further regulation of the trial of persons accused of certain offences committed in the East Indies; for repealing so much of an Act, made in the twenty-fourth year of the reign of his present Majesty (intituled 'An Act for the better regulation and management of the affairs of the East India Company, and of the British possessions in India, and for establishing a Court of Judicature for the more speedy and effectual trial of persons accused of offences committed in the East Indies') as requires the servants of the East India Company to deliver inventories of their estates and effects; for rendering the laws more effectual against persons unlawfully resorting to the East Indies; and for the more easy proof, in certain cases of deeds and writings executed in Great Britain or India.	Section thirty-eight so far as it relates to Courts of Justice in the East Indies.
Stat. 14 and 15 Vic., Cap. 99.	To amend the Law of Evidence ...	Section eleven and so much of section nineteen as relates to British India.
Act XV. of 1852 ...	To amend the Law of Evidence ...	So much as has not been heretofore repeated.
Act XIX. of 1853...	To amend the Law of Evidence in the Civil Courts of the East India Company in the Bengal Presidency.	Section nineteen.
Act II. of 1855 ...	For the further improvement of the Law of Evidence.	So much as has not been heretofore repealed.
Act XXV of 1861...	For simplifying the procedure of the Courts of Criminal Judicature not established by Royal Charter.	Section two hundred and thirty-seven.
Act I. of 1868 ...	The General Clauses Act, 1868 ...	Sections seven and eight.

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ACT No. X. OF 1873.

PASSED BY THE GOVERNOR-GENERAL OF INDIA IN COUNCIL.

(Received the assent of the Governor-General on the 8th April 1873.)

AN ACT TO CONSOLIDATE THE LAW RELATING TO JUDICIAL OATHS AND FOR OTHER PURPOSES.

Preamble.

Whereas it is expedient to consolidate the law relating to judicial oaths, affirmations, and declarations, and to repeal the law relating to official oaths, affirmations and declarations; It is hereby enacted as follows :—

I.—PRELIMINARY.

Short title.

1. This Act may be called "The Indian Oaths Act, 1873."

Local extent.

It extends to the whole of British India, and so far as regards subjects of Her Majesty, to the territories of Native Princes and States in alliance with Her Majesty;

Commencement.

And it shall come into force on the first day of May 1873.

Repeal of enactments.

2. The enactments specified in the schedule hereto annexed are repealed to the extent mentioned in the third column thereof.

Saving of certain oaths and affirmations.

3. Nothing herein contained applies to proceedings before Courts Martial, or to oaths, affirmations or declarations prescribed by any law which, under the provisions of the Indian Councils Act, 1861, the Governor General in Council has not power to repeal.

II.—AUTHORITY TO ADMINISTER OATHS AND AFFIRMATIONS.

Authority to administer oaths and affirmations.

4. The following Courts and persons are authorized to administer, by themselves or by an officer empowered by them in this behalf, oaths and affirmations in discharge of the duties or in exercise of the powers imposed or conferred upon them respectively by law :—

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(*a.*) All Courts and persons having by law or consent of parties authority to receive evidence;

(*b.*) The Commanding Officer of any military station occupied by troops in the service of Her Majesty: provided.

(1.) that the oath or affirmation be administered within the limits of the station, and,

(2.) that the oath or affirmation be such as a Justice of the Peace is competent to administer in British India.

III.—Persons by whom Oaths or Affirmations must be made.

Oaths or affirmations to be made by—

5. Oaths or affirmations shall be made by the following persons:—

Witnesses:—

(*a.*) all witnesses, that is to say, all persons who may lawfully be examined, or give, or be required to give, evidence by or before any Court or person having by law or consent of parties authority to examine such persons or to receive evidence:

Interpreters:

(*b.*) interpreters of questions put to, and evidence given by, witnesses, and

Jurors.

(*c.*) jurors.

Nothing herein contained shall render it lawful to administer in a criminal proceeding, an oath or affirmation to the accused person, or necessary to administer to the official interpreter of any Court, after he has entered on the execution of the duties of his office, an oath or affirmation that he will faithfully discharge those duties.

Affirmation by Natives or by persons objecting to oaths.

6. Where the witness, interpreter or juror is a Hindu or Muhammadan,

or has an objection to making an oath,

he shall, instead of making an oath, make an affirmation.

In every other case the witness, interpreter or juror shall make an oath.

IV.—Forms of Oaths and Affirmations.

Forms of oaths and affirmations.

7. All oaths and affirmations made under section five shall be administered according to such forms as the High Court may from time to time prescribe.

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And until any such forms are prescribed by the High Court, such oaths and affirmations shall be administered according to the forms now in use.

Explanation.—As regards oaths and affirmations administered in the Court of the Recorder of Rangoon and the Court of Small Causes of Rangoon, the Recorder of Rangoon shall be deemed to be the High Court within the meaning of this section.

Power of Court to tender certain oaths.

8. If any party to, or witness in, any judicial proceeding offers to give evidence on oath or solemn affirmation in any form common amongst, or held binding by, persons of the race or persuasion to which he belongs, and not repugnant to justice or decency, and not purporting to affect any third person, the Court may, if it thinks fit, notwithstanding anything hereinbefore contained, tender such oath or affirmation to him.

Notes.

The defendant in this case was cited as a witness by the plaintiff because the witnesses of the latter had left the country and the plaintiff could not tell when they would return and had been informed that under a Privy Council ruling no case could be withdrawn after the issues had been framed. The defendant was examined under the usual form of oath, and subsequently the plaintiff informed the Court that his witnesses had returned and they were examined to obviate all objections in the future, but their evidence was not considered by either of the Lower Courts, as they were of opinion that the plaintiff was bound by the oath of the defendant. The High Court considered, however, that this section was not in the contemplation of the plaintiff when he cited the defendant as a witness. That the defendant was examined under the usual form of oath and not under any oath or form of affirmation under this section ; and, under such circumstances, s. 11 was not applicable to the case. *Sreemunt Ram Totadar v. Ram Krishen Sen* (22 W. R., 387).

The matters in dispute in a suit were, by the desire of the parties to the suit, referred to arbitration. During the investigation of these matters by the arbitrators the plaintiff offered to be bound by the oath of the defendant administered on the Koran. The defendant agreed to take such oath, and such oath was accordingly administered to him by the arbitrators, and his evidence taken, and an award made based on the evidence so taken. On special appeal to the High Court of Allahabad by the plaintiff he objected for the first time, the objection not having been taken in his memorandum of special appeal, that the arbitrators were not legally competent to administer such oath, and the evidence so taken could not form a valid basis of an award, and the award was therefore void.

Held per *Pearson, J.*, (the Senior Judge) *Spankie, J.*, dissenting, with reference to the legal competency of the arbitrators to adminster the oath, that the objection was good, and that the arbitrators had no power to administer the oath. Per *Pearson, J.*, (*Spankie J.*, doubting,) that, as the objection was one which vitally affected the procedure of the arbitrators, it could not be ignored, although it was not preferred in the Lower Courts, and was not to be found in the memorandum of special appeal. Per *Pearson J.*, that the statement of the defendant made on an oath illegally administered could not form a valid basis of an award, and the award was void and should be set aside.

Per *Spankie, J*, that the plaintiff having offered to be bound by the oath, and the defendant having agreed to take it, the plaintiff was bound by the evidence given on such oath, and that, as the arbitrators had, by law and consent of the parties, authority to receive the evidence of the defendant the substitution by them of an oath on the Koran for an affirmation did not, under the provisions of s. 13 of this Act, invalidate such evidence, and consequently render the award based on such evidence void. *Wali Ulla v. Ghulam Ali* (I. L. R., 1 All., 535).

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Court may ask party or witness whether he will make oath proposed by opposite party.

9. If any party to any judicial proceeding offers to be bound by any such oath or solemn affirmation as is mentioned in section eight, if such oath or affirmation is made by the other party to, or by any witness in, such proceeding, the Court may, if it thinks fit ask such party or witness or cause him to be asked whether or not he will make the oath or affirmation.

Provided that no party or witness shall be compelled to attend personally in Court solely for the purpose of answering such question.

Note.

The defendant in a case called upon the plaintiff to swear on the Koran that the defendant was not a prior purchaser of the land in dispute and that he, the plaintiff, was not a witness to the execution of the deed. The plaintiff refused to swear and the Lower Appellate Court reversed the decree of the first Court and dismissed the suit. *Held* that the Lower Appellate Court was justified in raising a presumption from the plaintiff's refusal, that his case was false the Court having power to act, as it did, under the provisions of this Act. *Issu Meah v. Kalaram Chunder Naw* (2 C. L R., 476).

Administration of oath if accepted.

10. If such party or witness agrees to make such oath or affirmation, the Court may proceed to administer it, or if it is of such a nature that it may be more conveniently made out of Court, the Court may issue a commission to any person to administer it, and authorize him to take the evidence of the person to be sworn or affirmed and return it to the Court.

Note.

See the case of *Wali-Ulla v. Ghulam Ali* (I. L. R., 1 All., 535) cited in notes to section 8 supra p. 121.

Evidence conclusive as against person offering to be bound

11. The evidence so given shall, as against the person who offered to be bound as aforesaid, be conclusive proof of the matter stated.

Note.

See the case of *Sreemunt Ram Totadar v. Ram Kishen Sen* (22 W. R., 387) cited in notes to s. 8 supra p. 121.

Procedure in case of refusal to make oath.

12. If the party or witness refuses to make the oath or solemn affirmation referred to in section eight, he shall not be compelled to make it, but the Court shall record, as part of the proceedings, the nature of the oath or affirmation proposed, the facts that he was asked whether he would make it, and that he refused it, together with any reason which he may assign for his refusal.

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V.—MISCELLANEOUS.

Proceedings and evidence not invalidated by omission of oath or irregularity.

13. No omission to take any oath or make any affirmation, no substitution of any one for any other of them, and no irregularity whatever in the form in which any one of them is administered, shall invalidate any proceeding or render inadmissible any evidence whatever, in or in respect of which such omission, substitution or irregularity took place, or shall affect the obligation of a witness to state the truth.

see also 14 W.R. 294
23 W.R. 1. I.L.R. 1 All 207

Notes.

See the case of *Queen v. Anunto Chuckerbutty and others* (22 W. R., Cr., 1) cited under s. 118 of the Evidence Act, 1872 (ante p. 93.)

See also the case of *Queen v. Missamat Itwarya* (22 W. R., Cr., 14) cited under the same section of the same Act (ante p. 93.)

The majority of the Full Bench at Calcutta *held* (*Jackson, J.*, dissenting) that the word "omission" in this section includes any omission and is not limited to accidental or negligent omissions *Queen v. Sewa Bhogta* (23 W. R., Cr., 12).

See also the case of *Wali-Ulla v. Ghulam Ali* (1. L. R., 1 All., 535) cited in notes to s. 8 supra p. 121. see also I.L.R. 1 All 207.

Persons giving evidence bound to state the truth.

14. Every person giving evidence on any subject before any Court or person hereby authorized to administer oaths and affirmations shall be bound to state the truth on such subjects.

Amendment of Penal Code, sections 178 and 181.

15. The Indian Penal Code, sections 178 and 181 shall be construed as if, after the word "oath" the words "or affirmation" were inserted.

Official oaths abolished.

16. Subject to the provisions of sections three and five, no person appointed to any office shall, before entering on the execution of the duties of his office, be required to make any oath, or to make or subscribe any affirmation or declaration whatever.

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SCHEDULE.

(See Section 2.)

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PART I.—STATUTES.

Number and year.	Title.	Extent of repeal.
9 Geo. IV., c. 74 ...	An Act for improving the Administration of criminal Justice in the East Indies.	Sections thirty-six and thirty-seven.
3 and 4 Wm. IV., c. 49.	An Act to allow Quakers and Moravians to make Affirmation in all cases where an oath is or shall be required.	The whole Act, so far as it applies to British India.
3 and 4 Wm. IV., c. 82.	An Act to allow the people called Separatists to make a solemn Affirmation and Declaration instead of an oath.	The whole Act, so far as it applies to British India.
5 and 6 Wm. IV., c. 62.	An Act to repeal an Act of the present Session of Parliament, intituled "An Act for the more effectual Abolition of Oaths and Affirmations taken and made in various Departments of the State, and to substitute declarations in lieu thereof; and for the more entire Suppression of voluntary and extrajudicial Oaths and Affidavits;" and to make other Provisions for the Abolition of unnecessary oaths.	The whole Act, so far as it applies to British India.
1 and 2 Vic., c. 77..	An Act for permitting Affirmation to be made instead of an oath in certain cases.	The whole Act, so far as it applies to British India.

PART II.—ACTS.

Number and year.	Subject or Title.	Extent of repeal.
IX. of 1836 ...	Commanding Officer's power to administer Oaths.	The whole.
XXI. of 1837 ...	Office Oaths and Declarations. ...	So much as has not been repealed.

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PART II.—ACTS.—*(Continued.)*

Number and year.	Title.	Extent of repeal.
V. of 1840 ...	An Act concerning the Oaths and Declarations of Hindoos and Mahomedans.	So much as has not been repealed.
XV. of 1843 ...	An Act for the more extensive employment of Uncovenanted Agency in the Judicial Department.	Section two.
XV. of 1852 ...	An Act to amend the Law of Evidence.	Section twelve.
XII. of 1856 ...	An Act to amend the Law respecting the employment of Ameens by the Civil Courts in the Presidency of Fort William.	Section four.
VII. of 1857 ...	An Act for the more extensive employment of Uncovenanted Agency in the Revenue and Judicial Departments in the Presidency of Fort St. George.	Section two.
XII. of 1859 ..	An Act to make better provision for the trial of Pilots at the Presidency of Fort William in Bengal for breach of duty.	Sections twelve and fifteen.
XVIII. of 1863 ...	An Act to make provision for the speedy and efficient disposal of the business now pending in the office of the Master of the High Court of of Judicature at Fort William in Bengal, and to provide for the abolition of Oaths now administered to Hindoos and Mahomedans in the said Court, and to amend the Code of Civil Procedure in respect of process issued out of the said Court in the exercise of its Original Civil Jurisdiction.	Section nine.
IV. of 1866 ...	An Act to amend the constitution of the Chief Court of Judicature in the Punjab and its Dependencies.	Section five.
II. of 1869 ...	An Act for the appointment of Justices of the Peace.	Sections seven and eight.
IV of 1871 ...	An Act to consolidate and amend the Laws relating to Coroners.	Section seven, and in section thirty-eight, the words "and such deputy shall take and subscribe, before one of the Judges of the High Court, an oath that he will faithfully discharge the duties of his office."

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PART II.—ACTS.—*(Continued.)*

Number and year.	Title.	Extent of repeal.
VI. of 1871 ...	An Act to consolidate and amend the law relating to the District and Subordinate Civil Courts in Bengal.	Section thirteen.
VI. of 1872 ...	An Act to Amend the Law relating to Oaths and Affirmations.	The whole.
XVIII. of 1872 ..	An Act to amend the Indian Evidence Act, 1872.	Section twelve.
Bombay Act VI of 1866.	An Act to amend the Law relating to certain Declarations of Office in the Bombay Presidency.	The whole.

PART III.—REGULATIONS.

Number and year.	Title.	Extent of repeal.
Bengal Regulation IV. of 1793.	A Regulation for receiving, trying and deciding Suits or Complaints declared cognizable in the Courts of Dewany Adawlut established in the several Zillahs, and in the Cities of Patna, Dacca, and Moorshedabad.	So much of section six as has not been repealed.
Bengal Regulation III. of 1803.	A Regulation for receiving, trying, and deciding Suits or Complaints declared cognizable in the Courts of Adawlut established in the several Zillahs in the Provinces ceded by the Nawab Vizier to the Honourable the English East India Company.	So much of section seven as has not been repealed, and section eight.
Bengal Regulation IX. of 1833.	A Regulation to modify certain portions of Regulation VII of 1822, and Regulation IV of 1828 : to provide for the more speedy and satisfactory Decision of Judicial Questions cognizable by Officers of Revenue employed in making settlements under the above Regulations ; for enforcing the production of the Village Accounts ; for the more extensive Employment of Native Agency in the Revenue Department ; and to declare the Intent of section V, Regulation VII of 1822, touching Claims to Malikana.	Section nineteen.

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PART III.—REGULATIONS.—*(Continued.)*

Number and year.	Title.	Extent of repeal.
Madras Regulation of 1803.	A Regulation for defining the Duties of the Board of Revenue, and for determining the extent of the Powers vested in the Board of Revenue.	Sections two and three.
Madras Regulation II. of 1803.	A Regulation for describing and determining the conduct to be observed by Collectors in certain cases.	Sections three and four.
Madras Regulation XIV of 1816.	A Regulation for amending and modifying the Rules which have been pased regarding the Office of Vakeel or Native Pleader in the Courts of Civil Judicature.	Section five.
Bombay Regulation VI of 1799.*	A Regulation for enacting the existing Rules for the Collection of the Bombay Customs.	Section two, clause two, from and including the words "Previous to" down to the end of that clause.
Bombay Regulation II of 1827.	A Regulation for defining the constitution of Courts of Civil Justice, and the powers and duties of the Judges and officers thereof.	Sections four and fifteen. In section eleven, clause one, the words "who previously to entering on the duties of their offices shall take and subscribe in open Court the oath contained in Appendix B" Appendix B.
Bombay Regulation XII of 1827.	A Regulation for the establishment of a system of Police throughout the Zillahs subordinate to Bombay, for providing Rules for its Administration, and for defining the Duties and powers of all Police Authorities and servants.	So much of section three, clause five, as has not been repealed.
Bombay Regulation XIII of 1827.	A Regulation for defining the constitution of Courts of Criminal Justice, and the Functions and Proceedings thereof.	So much of section thirty-six, clause two, as has not been repealed.
Bombay Regulation XVI of 1827.	A Regulation for defining the duties of the Collector, and his powers in regard to subordinate Revenue officers, and providing Rules for the guidance of Land Revenue Officers in general throughout the Territories subordinate to Bombay.	Section three and so much of section five as relates to taking oaths.

*Printed at p. 246 of Clarke's edition of the Bombay Regulations, London, 1851.

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PART III.—REGULATIONS.—*(Continued.)*

Number and year.	Title.	Extent of repeal.
Bombay Regulation XIX of 1827.	A Regulation for the Presidency, prescribing Rules for the Assessment and Collection of the Land Revenue, and for collecting Taxes on Shops and Stalls, on beating the Battakee or making proclamation by the Crier, on Country Music, on Wedding Sheds and places of Public Amusement, on Houses, on Carriages, and on Horses; for causing Individuals who may sell or transfer Houses or Tenements subject to quit or ground rents to give Notice of the same to the Collector; and also for levying Fees in the Court of Petty Sessions and Police Offices.	Section one, clause two; and section six from and including the words "and shall" down to the end. Appendix A.
Bombay Regulation XVIII of 1830.	A Regulation providing for the appointment of a Joint Judge within the Zillah of Poonah.	Section two.

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INDEX.

ABBREVIATIONS:
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ABETMENT:
of offence, confession of persons tried for: *See* Confession.

ACCEPTOR: *See* Bill of Exchange.
accommodation acceptor: *See* Oral Evidence.

ACCESSION:
and sign manual of Sovereign, judical notice to be taken of, 50.

ACCIDENT:
evidence to show whether act due to, or to intention, 14.

ACCOMPLICE:
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